16353

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1903.

No. 532.

Pacific Electric Railway Company,
Appellant,

vs

The City of Los Angeles, P. W. Powers, W. H. Pierce et al.,
Appellees.

BRIEF ON BEHALF OF THE APPELLANT, THE PACIFIC ELECTRIC RAILWAY COMPANY.

Statement of the case.

I.

This cause was heard in the Circuit Court of the Ninth Circuit, Southern District of California, Southern Division, upon the bill filed by the appellant and the

demurrers filed thereto by the defendants, the appellees.

The suit was brought by the appellant against the City of Los Angeles, P. W. Powers, W. H. Pierce, George P. McLain, Frank Walker, Wm. M. Bowen, A. A. Allen, B. S. Lauder, R. A. Todd, E. L. Blanchard, who composed the council of the city of Los Angeles, and M. P Snyder, the mayor of the city, and the Los Angeles Traction Company, Wm. S. Hook, and E. A. Davis.

Two separate demurrers were filed, one on behalf of the city, the council and the mayor [Trans. pp. 30-31, fols. 47-48]; the other on behalf of the Los Angeles Traction Company, Wm. S. Hook and E. A. Davis [Trans. pp. 32-33, fols. 50-51].

The questions involved in the case arise out of the bill and the demurrers thereto, and the questions arising out of the demurrer filed on behalf of the city, its council and mayor, were:

1. That the court had no jurisdiction of the subject matter of the suit.

2. That the bill was without equity, and the plaintiff was not entitled to the relief prayed for against them.

3. That it was uncertain, in that it could not be determined from the bill what number of franchises was embraced in the notice of sale set forth in paragraph XII of the bill, and whether one or more than one, and that it could not be determined what number of franchises was offered for sale, sold or granted by the city council, whether one or more.

The questions raised by the demurrer of the Traction Company, Hook and Davis, were:

1. That the court had no jurisdiction.

2. Want of equity entitling the complainant to any relief against the defendants.

In the suit in the court below an application was made for a preliminary injunction, and divers affidavits were filed by the respective parties, but the appeal here is from the decree sustaining the demurrers and dismissing the bill.

The facts briefly stated, as set forth in the bill, after alleging the corporate character of the City of Los Angeles and the official character of its council and mayor, and the incorporation of the Los Angeles Traction Company, a corporation organized under the laws of the state of Illinois, and the citizenship of W. S Hook and E. A. Davis, are as follows:

In the month of March, 1901, the legislature of the state of California passed an act providing for the sale of street railroad and other franchises in municipalities, and providing conditions for the granting of such franchises, with certain exceptions, which exceptions, however, do not relate to the franchises under consideration here. The entire act is set forth in the bill in paragraph VIII [Trans. pp. 2-5, fols. 4-8]. And in its main features it provides for the disposition of all franchises in any city and county, or city or town, within the state, with the exception of steam railroads and also excepting telegraph or telephone lines doing an interstate business, and renewals of franchises for piers, chutes or wharves, which were to be granted

upon the conditions in the act provided, and not otherwise.

In the second section of the act, it is provided that an application for a franchise may be made and filed with the governing or legislative body of the municipality, and thereupon its governing body should, in its discretion, or if the application were accompanied with a petition praying that the same be granted signed by the owners of three-fourths of the frontage of the real property upon and along the route of the franchise applied for, they must advertise the fact of such application with a statement that it was proposed to grant the same, which advertisement should be in one or more newspapers of the city and county, and should state that bids would be received for such franchise, and that it would be awarded to the highest bidder, and prescribing the time of publication before any further action could be taken. It was required also by the act that the publication must state the character of the franchises or privilege proposed to be granted, the term, and if it were a street railroad, the route to be traversed, and must further state that sealed bids would be received up to a certain hour, and day, named, and the successful bidder and his assigns should, during the life of the franchise, pay to the municipality, two per cent (2%) of the gross annual receipts of the person, partnership or corporation to whom the franchise is awarded arising from its use, operation or possession.

An exception was here made that no percentage should be paid for the first five years, and thereafter should be payable annually, and if it were not paid

the franchise should be forfeited. But with the further provision that where the franchise was the renewal of a right already in existence, the payment of a percentage of the gross receipts should begin at once.

There were further provisions prescribing the manner in which these gross receipts should be estimated where the franchise was an extension of an existing system of street railroads. It was then further provided, in the 5th section of the act, that the advertisement should contain the statement that the franchise would be granted to the person, firm or corporation who should make the highest cash bid therefor, provided that, at the time of the opening of the bids, any responsible firm or corporation present or represented might bid for the franchise or privilege a sum not less than 10% above the highest sealed bid therefor, and that that bid might be raised 10% by any other responsible bidder present, and the franchise or privilege should finally be struck off, sold and granted by the said governing body to the highest bidder therefor, in gold coin of the United States, and this successful bidder was required to deposit with the governing body or such person as it might direct, the full amount of his or its said bid, within 24 hours thereafter, and if he or it failed to do so, then the franchise or privilege should be granted to the next highest bidder therefor.

Section 6 provided that when the franchise was granted, the work should be commenced in good faith within not more than four months from the granting of the franchise, and completed within not more than three years thereafter, and if not so completed the

franchise should be forfeited, with a provision for the extension of the time by the governing body, of not more than three months for good cause shown.

The seventh section required the grantee to file a bond running to the city in a penal sum to be prescribed by it, and set forth in the advertisement for bids, conditioned for the performance of the terms and conditions of the franchises. And if this bond were not filed within five days after the franchise was awarded, the award should be set aside and the same might be granted to the next *lowest bidder*, or again offered for sale, in the discretion of the said governing body.

The 8th section provided for suit by the attorney general to forfeit the franchise for the non-compliance with any condition thereof.

The 9th section prohibited this governing body from inserting any clause or condition in any franchise or grant offered or sold under the terms of the act which should, directly or indirectly, *restrict free and open competition and bidding therefor*, and no clause or provision should be inserted in any franchise offered for sale which should in any wise *favor one person, firm or corporation as against another in bidding for the purchase thereof*.

The 10th section made it a misdemeanor for any member of the council or governing body, by his vote, to violate or attempt to violate the provisions of the section, and subjected him to deprivation of his office if convicted of such an offense.

The 11th section repealed all acts or parts of acts in

conflict therewith, but limiting the repeal so as not to affect certain acts mentioned in the repealing clause, but not material to be considered here.

Under this act the appellant presented an application to the council for certain street railway franchises, and the council exercised its discretion, and did thereupon proceed to advertise the fact of the application, together with the statement that it was proposed to grant the same, and this advertisement did, in all respects, conform to the provision of the statute, and the notice of the sale of this franchise is set forth in full in the transcript of the record, paragraph XII, pages 6-13, fo's. 10-20.

In the notice, or advertisement, the time fixed for receiving sealed bids was the 10th of February, 1902, at 11 o'clock A. M., and prior to that time the appellant delivered a sealed bid to the council of the city of Los Angeles, which is its legislative or governing body, offering for the said franchise $25,000. Within the time prescribed, William S. Hook, who was the president of the Los Angeles Traction Company, delivered a sealed bid for $37,500. E. A. Davis presented a sealed bid offering to purchase the said franchise for $139,000. One E. Murray did also, within the proper time, present a sealed bid offering for the franchise advertised, $415,000. And these were the only bids presented to the council.

And on the 10th of February, 1902, they were opened, and no bid of 10% upon the amount bid by E. Murray was made by anybody, and thereupon the council accepted Murray's bid, and ordered the fran-

chise to be struck off, sold and granted to Murray, and directed the city treasurer to receive the money to be paid for such franchise by Murray, and also named the time when the 24 hours would expire in which the money was to be paid under the provisions of the statue, and which time was 3 o'clock and 15 minutes on February 11, 1902.

Now in fact the bids of Hook, Davis and Murray all proceeded from the same quarter. They were made on behalf of the Los Angeles Traction Company, and they were made with the fraudulent intent to prevent competition in the bidding before the council; this bid of Murray for the sum of $415,000 was put in at the suggestion and for the benefit of the Los Angeles Traction Company, the parties knowing that nobody would bid 10% on the bid of Murray, and that the franchise was not worth the sum of $415,000. Murray was not a person of any financial standing, and wasn't worth, at the time the bid was made, nor at any time afterwards, a thousand dollars, and could not, from his own funds or through any credit of his own, have paid, and he never intended to pay, the sum of $415,000, nor any part thereof, all of which was known and understood by the Los Angeles Traction Company, and Davis and Hook. And Murray didn't pay the sum of $415,000 within 24 hours, and never offered to pay that or any sum, and as a matter of fact he never appeared before the council on the 11th day of February, 1902, nor at any other time.

On the 11th day of February, 1902, the Los Angeles Traction Company, Davis and Hook, the agents of said

company, did appear before the said council, and when the 24 hours expired, in pursuance of the fraudulent scheme to prevent competition in the bidding, they claimed and pretended that the council had no power or authority under the act, to do any other thing, or take any other proceedings looking to the sale of the franchise except to accept the bid already put in next highest to that of Murray, towit, the bid of Davis for the sum of $139,000, which bid was also made on behalf of the Traction Company, and that it was the duty of the council then to sell and grant the franchise to Davis, and they demanded that the franchise be awarded to Davis on said bid and for the benefit of the Los Angeles Traction Company.

Before the 24 hours had expired the appellant became apprised of the fact that this bid of Murray was a fraud, and was a mere device to prevent competition in the bidding before the council, and that Murray was not going to appear within the 24 hours, and would not pay the said bid or any part thereof, and consequently the appellant appeared, by its authorized agents, before the council on the 11th day of February, 1902, and prior to the expiration of the 24 hours, did present, in writing, a bid of $152,900 for the franchise, being 10% over and above the bid of Davis, and when the 24 hours had expired it did offer to the council of the city the said sum of $152,900.

On the 11th day of February, and after the 24 hours had expired, and after the appellant had offered the bid of the $152,900 for the franchise, the council called before them the city treasurer, who informed them that the purchase money had not been paid by

Murray, and thereupon Mr. Blanchard, a member of the council, moved that Murray be declared a fraudulent and irresponsible bidder for the Electric Railway franchise for which he had presented his bids, and each of them, and that his said bids were null and void, which motion was seconded and was carried by the vote of 7 of the council. And after this proceeding, the matter of the sale of the street railway franchise over the route commencing at the intersection of 7th and Spring streets, and which is the one in controversy here, was taken up for consideration, and thereupon the appellant did bid for the franchise the sum of $152,900.

A word of explanation is necessary here to the understanding of some of these proceedings. There were several different franchises offered for sale, and the publication made, and the time for receiving the bids was set for the same time, and bids had been made upon each of these, and Murray himself was a bidder on each so that when Mr. Blanchard moved that his bids for the electric railway franchises which he had presented, and each of them, was null and void, he had reference to all of these several bids, including the bids for the franchises which are now here in controversy.

At the same time that the appellant made the bid, after the order declaring Murray a fraudulent and irresponsible bidder, it presented to the council a certificate of deposit drawn on the Farmers & Merchants Bank of Los Angeles, payable to the city of Los Angeles, for the sum of $152,900. Thereupon the pres-

ident of the council called for further bids for the purchase of the said franchise over and above the bid made by the appellant. But no other bids were made, and thereupon, on motion of Blanchard, seconded by Mr. Allen, another member of the council, the council ordered that the franchises over the said route be struck off, sold and granted to the complainant, the appellant here, for the said sum so bid, and that the treasurer was authorized and directed to receive the purchase money, and the order was made striking off, selling and granting to the appellant the said franchises described in the notice set forth in the bid, for the sum of $152,900, and in pursuance of this order the $152,900 was immediately paid to the treasurer of the city of Los Angeles in gold coin of the United States, and the money was accepted by the treasurer and by the council of the city. And thereupon and immediately the appellant as principal, with good and sufficient sureties, executed the bond to the city in the sum of $25,000, all as provided in the said statute, and the bond was executed and approved by the council and filed in the office of the city clerk. And the money having been paid and the bond approved, the council did then finally strike off, sell and grant the franchise to the complainant.

Davis and Hook did, at the same time, set up and claim that the said Davis had become entitled to the said franchise, and they tendered to the city the $139,000 in gold coin, the amount of his bid, but it was refused by the council. And Hook and Davis and the Traction Company do claim the franchise and ad-

versely to the complainant, which is the cause of their being made parties defendant in this suit.

The bill alleges that these claims of the defendants, Davis, Hook and the Los Angeles Traction Company, are without any foundation; that they have no right to the franchise, or the right to construct the street railroad or operate the same thereon, or to exercise any of the franchises struck off, sold and granted to the appellant. [Trans. p. 17, fol. 27, par. XXVII.]

After the money had been paid by the appellant and received by the city treasurer under the direction of the council, and after the bond had been executed, approved and filed, the council did then pass a more formal ordinance granting all these rights to the appellant, and they presented this ordinance to M. P. Snyder, the mayor of the city, and he, on the 21st day of February, 1902, returned the ordinance without having affixed his signature thereto, or approved the same, and with his objections to the said ordinance.

And thereafter, and on the 21st of February, 1902, the council, by reason of the mayor's disapproval of the ordinance, adopted a motion that the ordinance itself should be reconsidered, and upon vote being taken upon the passage of the ordinance, notwithstanding the mayor's veto, the council voted against the passage of the ordinance. And on the same day the council passed a resolution pretending and purporting to order any and all bids for the said electric street railway franchise in the city of Los Angeles in controversy here, and including the bid of

the appellant, should be rejected, and directing, or pretending to authorize the treasurer of the city to return the money and the bond.

These proceedings were taken under the assumption that an ordinance granting the franchise in addition to the order of the council finally striking off, selling and granting to the complainant the said franchise, should be passed, and that it was necessary that the mayor of the city should approve the said ordinance, or in case he objected to it, to return it with his disapproval and the reasons therefor, and that then the council should repass the ordinance by the vote required by the charter of the city in order to its taking effect. But it is alleged in the bill that under the statute of California set forth in the bill, neither the council of Los Angeles nor the mayor had any discretion as to, or in the disposition of the bid of the appellant for the property, but they were, by the operation of the act of the legislature, ordered to strike off, sell and grant the same to the appellant; that no ordinance was necessary to complete the grant, nor did the mayor of the city have authority to perform any function in, about, or concerning the sale of franchises, rights and privileges under that act, and had no power either to approve or disapprove any such sale. That the said pretended veto by the mayor was wholly void, and had no effect whatever upon the rights of the appellant, and it was further alleged that the title to the said franchise had fully vested in the appellant under the statute, and that there was no power or authority in either the mayor, or the council,

or in both, to in any manner affect the rights which had accrued to the appellant.

Trans. pp. 17-18, par XXVIII, fols 27-29.

And the bill proceeds to allege that at the same session it was moved by the members of the council that the application of the appellant for the franchise over these streets should be referred to the board of public works, and that that board should redraft a notice of the sale of the same, which motion was carried, and that among the applications so referred was the one which had been purchased by the appellant here, and paid for as hereinbefore stated. And it was further alleged by the appellant that it had become vested with the title of the franchise, was the absolute owner of the same as granted to it, and that the resolutions and orders of the council pretending to reconsider the vote, or re-advertising the application of the appellant for the purchase of the franchise, and all other proceedings looking to the vacating and setting aside the grant, so made to the appellant, had been made and taken without any authority, and with the intent to deprive the appellant of its property without due process of law, and in violation of the constitution of the United States prohibiting any state from depriving any person of life, liberty or property without due process of law.

Trans. par. XXX, p. 19, fol 29.

This was followed by allegations repeating some of the obligations imposed upon the appellant by the statute under which the purchase was made, namely, that it must commence work within four months, and

complete it within three years. That it was desirous of performing the conditions of the said grant and preserving its property rights in the said franchises, and to that end desired to commence work upon the same in the construction of the said road, and for the purpose of completing the same at the earliest practicable moment, and to operate its cars and exercise the privileges and franchises granted, as soon as practicable, and that these things were necessary to facilitate public business and transportation, and that from the operation of the roads and the exercise of the franchises and privileges large profits would accrue to the appellant, and that the council of the city of Los Angeles and other public authorities threatened and intended to prevent appellant from constructing, or even attempting to construct, the street railway on the public streets in the city of Los Angeles, and to forcibly prevent appellant from constructing or attempting to construct the railways on the streets mentioned, or exercising any of the rights, privileges and franchises therein granted, and that on the 26th of February, 1902, the council had passed an order instructing the mayor, the street superintendent and the chief of police to stop and prevent any attempt that the appellant might make to construct any street railway on any of the said public streets, with all force at their command, and that these public officers and police officers, acting under said instructions, would undertake by violence to prevent appellant from constructing a railway, or attempting to construct it, or exercising any of the privileges, or having any enjoyment of the property so acquired by it unless pre-

vented by the court. [Trans. pp. 19-20, par XXXIII.]

And then follow further allegations of what was required of the appellant under this grant, and that these franchises had been granted under the terms expressed in the notice, and under the provisions of this statute, and the danger of forfeiture accruing in the event that they did not comply with the terms and conditions of the grant.

And in the 35th paragraph, commencing on page 21, it was alleged that this bond was given for the performance of the contract which had thus been made between the city and the appellant, and in pursuance of the said statute.

Complainant then again set forth its claim that by the award and grant of the said franchises, in consideration of the payment of the sum mentioned, and of the execution of the said bond, the appellant had become vested with the title to the said franchises, rights and privileges and were bound by all the terms and conditions of the said grant, and that it still is the owner in fee of all said rights and privileges, subject to said terms and conditions.

And in paragraph XXXVII of the bill, alleged that in order to perform the said conditions it was necessary to commence the work immediately, and that to commence such construction it would be necessary for the complainant to incur great expense in the purchase of necessary material and machinery and appliances of all kinds which would be necessary to the construction of the said road, turnouts, switches, and other adjuncts to the operation of the road, and to

provide rolling stock and other appliances necessary to the equipment and operation thereof. That contracts would have to be made for the purchase thereof laborers employed, and contracts made for the construction of the road, and work commenced immediately, and that the council and the city had threatened and intended and would, unless restrained, prevent the complainant from commencing the construction of the road and such works and appliances, adjuncts and accessories necessary to the construction and operation of the road, and the exercise of the said rights, privileges and franchises so purchased, and thus the expenditures that might be made in the preparation for the construction would be of no effect unless the complainant were protected against this threatened interference.

And in paragraph XXXVIII [Trans. pp. 22-23] it was further alleged that the council threatened and intended, and would, resell these franchises, and in paragraph XXXIX, that the said proceedings so taken reconsidering the vote and attempting to cancel and annul the grant were void, and of no effect whatever but if such resale were made it would cast a cloud upon the title of the complainant, and would greatly hinder and impede the complainant in the exercise of the franchise, and in the use and enjoyment of the property so belonging to it under the grant.

Acting under the order of the council, the treasurer of the city did offer to return the $152,900 to the appellant, and also to return the said bond, but the appellant refused to accept either, and denied the right

of the city to cancel, vacate or annul the grant, or in any manner affect the rights of the plaintiff under the purchase.

It was further alleged in paragraph XLI (pp. 23-24) that if the council did resell these franchises, the city would aid such purchaser with the police force of the city to take possession of the said property, roads, franchises, rights and privileges, and construct the road over and along said streets, and oust and exclude the complainant therefrom, and a multiplicity of suits would become necessary to protect the property rights of the appellant, and that the litigation would entail great expense, and also that the complainant would be compelled to expend a large sum of money in providing for the construction of the road, or else hazard the forfeiture of its right by refraining from making such expenditures and incurring obligations for material, appliances, etc.

In paragraph XLII (p. 21) it is alleged that all of these proceedings attempting to repeal, rescind, vacate and annul the grant made, and to wrest the property purchased from the complainant, and prevent the exercise of the rights, privileges and franchises granted, were all in violation of the constitution of the United States, and void.

It was further alleged that the matter in dispute, exclusive of interest and costs, exceeds the value of $2,000, and is of the value of not less than $152,900

The prayer was for a decree that the complainant was the owner in fee simple of the property, rights, privileges and franchises granted to it; that the de-

fendants had no right, title, or interest in them; that the orders and resolutions of the council of the city pretending to reconsider the vote by which the rights, privileges and franchises were granted to the complainant, and all the proceedings taken by the council for the purpose of divesting the title of the complainant to the property, rights, privileges, etc., and all the proceedings attempting to impair the contract rights of the complainant under the said grant, or to hinder and impede the complainant in the use and enjoyment of its property, or to rescind, vacate or set aside the sale, or to resell the same, were null and void, and that they be vacated and set aside, and the defendants and their officers, agents, employees and attorneys be restrained from preventing the complainant from constructing the said road, turnouts, switches, etc., or from preventing the complainant from operating its road, and exercising all of the rights, privileges and franchises granted, or ousting or attempting to oust or dispossess the complainant, etc.

The questions involved are:

1. Did the court have jurisdiction of the subject matter of the action?

2. Did the rights, privileges and franchises struck off, sold and granted to the plaintiff vest in the complainant under the provisions of the statute and under the facts stated in the bill.

3. Did the subsequent action of the council attempting to rescind the sale, and to prevent the appellant from exercising the rights, privileges and franchises granted, and using and enjoying the prop-

erty claimed by it, deprive the appellant of its property without due process of law, and in violation of the constitution of the United States?

4. Did the sale of the said franchises, rights, privileges and properties to the complainant by the said city council, and the payment of the said sum of money and the execution of the said bond, constitute a contract between the parties?

5. Was the action of the city council a law impairing the obligation of that contract?

6. Was the bill of complaint uncertain in the particulars mentioned in the demurrer of the city and the council and the mayor to the bill?

These questions arose out of the facts alleged, and the demurrers to the bill.

The cause was argued before the circuit court, and submitted, and the court sustained the demurrers to the bill. The court filed a written opinion in the cause, from which it will be seen that the demurrer upon the ground that the court had no jurisdiction was overruled, and the decision of the court sustained the jurisdiction, and the court then proceeded to dispose of the case upon its merits, and was of the opinion that under the facts alleged, the rights, privileges and franchises mentioned in the bill never vested in the complainant, and that the council had no authority to receive or accept the bid of the complainant nor to award the franchises to it, and therefore, of course that the subsquent action of the council did not deprive the plaintiff of any property, nor impair the obligation of any contract.

II.

Specification of the errors relied upon.

1. The court erred in sustaining the demurrers of the defendants, the City of Los Angeles, the Council and the Mayor, to the plaintiff's bill of complaint.

2. In sustaining the demurrer of the defendants, the Los Angeles Traction Company, Wm. S. Hook and E. A. Davis, to the complainant's bill of complaint.

3. The court erred in holding and deciding that the complainant had not acquired, and was not the owner of, the franchises and privileges to construct and operate the street railway in the city of Los Angeles, as alleged in the complainant's bill of com plaint.

4. The court erred in deciding that the complainant had not a valid contract with the city of Los Angeles entitling it to exercise the privileges and franchises to construct and operate the street railway in said city as alleged in said complainant's bill of complaint.

5. The court erred in deciding that the proceedings of defendants, the city of Los Angeles and the council of the city, for the sale of the franchise and privileges set forth and described in the complaint including the striking off and granting the same to the plaintiff, and the payment of the purchase price thereof, and the execution of the bond, did not vest the title to the franchises and privileges in said plaintiff.

6. The court erred in deciding that the proceed-

ings of the defendants taken subsequently to striking off, selling and granting said franchises and privileges described in the said bill of complaint of the plaintiff and the payment of the purchase price thereof, and the acceptance of the same, and the execution of the bond, and approval thereof, did not deprive the plaintiff of its property so purchased, without due process of law in violation of the constitution of the United States as alleged in the complainant's bill.

7. The court erred in deciding that the said acts of the defendants did not, as alleged in the complainant's bill of complaint, impair the obligation of the contract to construct and operate a street railway in the city of Los Angeles, in violation of the constitution of the United States.

8. The court erred in deciding that the defendants did not take the property of the complainant namely, the said franchises and right to construct the street railway as alleged in the complaint, without due or any compensation, and in violation of the constitution of the United States.

9. The court erred in dismissing the complainant's bill of complaint.

10. The court erred in decreeing that the defendants should recover from the complainant their costs and disbursements in the cause.

III.

Brief of the Argument.

In the court below the objection to the jurisdiction was argued at great length, and doubtless will be insisted upon in this court, and there were many questions raised as to the proceedings before the council in the disposition of this franchise which were not considered in the court below nor decided, but which doubtless are open to consideration here, and will, or some of them will, doubtless be insisted on here. For that reason we shall, before concluding the brief, consider some questions not specifically considered or decided in the court below, but in this argument we shall first direct our attention to the consideration of the propositions decided against us by the court, and upon which its decision was based.

It will be seen, from an examination of that opinion, that the court's decision turned entirely upon the interpretation placed upon the statute under which the proceedings were taken and the property rights herein asserted to belong to the plaintiff, claimed.

All of the facts stated in the bill of complaint were of course, by the demurrers admitted to be true. The proceedings therefore did take place before the council, both with respect to granting the franchise and to vacating it, which we have alleged, and not only are these facts accepted by the court to be true, but also the allegation of the fraudulent device resorted to by the Traction Company to exclude competitive bidding was accepted as true, and its fraudulent character severely denounced by the court.

After stating in the opinion that when the time thus fixed had expired (that is, for the payment of Murray's bid),

> "And Murray had failed to make the required deposit, the action that should have been next taken is prescribed in the last clause of said section already partially considered which provides that if the successful bidder fails to make the deposit required of him, the franchise shall be granted to the next highest bidder therefor. When, speaking concretely, the contingency referred to in said clause, namely, Murray's failure to deposit the amount of his bid, occurred in the afternoon of February 11, 1902, it was then the duty of the council to grant the franchise to the next highest bidder, unless there was some sufficient reason for a refusal. This qualification of the council's duty I make because of the charge in the bill that the next highest bidder was fraudulent. Assuming the truth of this charge, which must be done on demurrer, the council ought not to have granted the franchise to said bidder. When it refused to do so, however, its power in the premises was exhausted because the said act of 1901 makes no provision for any subsequent proceeding, and the alleged grant of the franchise thereafter to complainant was without authority and void. The only way said franchise could have been lawfully granted after its refusal to the next highest bidder was under and pursuant to a new advertisement.
>
> "Complainant's argument, that this construction of said act impairs its efficiency by enabling designing and unscrupulous presons to defeat the disposition of any franchise offered for sale under such act, if not without force, can but be

deemed inconclusive, for the rule is well settled that the language of a statute when plain and unequivocal determines its meaning regardless of consequences. * * *

"The truth is, said act of 1901 never contemplated the scandalous frauds here charged, without denial, against some of the defendants, and hence, it may be, no adequate safeguards against them were erected. This defect in the law, however, if it exists, is an omission to be supplied by the legislature, not by the courts.

"The declaration of the council, made after Murray's default, that he was a fraudulent and irresponsible bidder, and that his bid was null and void, is an immaterial circumstance. If such an inquiry was authorized, it must have preceded the order striking off the franchise to Murray, since said order necessarily determined the lawfulness of his bid, and there was no power in the council to review said order. * * * After the franchise had been struck off all the council could lawfully do under the pending advertisement, was to allow Murray 24 hours to make the deposit, and if he failed to do so, grant, or, on sufficient grounds, refuse to grant the franchise to the next highest bidder.

"For the reasons above given I am of the opinion that the complainant has not acquired the franchise it here claims, nor has it any valid contract with the city in relation thereto.

"This conclusion renders it unnecessary for me to pass upon the other questions which have been argued by counsel, and are outlined in an earlier part of this opinion."

Trans. pp. 47-48.

We have quoted this part of the opinion first for the purpose, in part, of showing that there was and is no question of how the allegations of the bill with respect to this fraudulent scheme to prevent bidding was regarded by the court below, or, for that matter, by the defendants themselves. It was a deliberately intended fraud upon the statute of the state. The supposed three bidders, Hook, Davis and Murray, were one bidder, and that bidder was the Los Angeles Traction Company, who was using all three as pretended competitors, but in truth arranging their bids in such manner as to preclude competition, inspired by an interpretation of the statute, which in this case was, except as to one part of it, sustained by the court below. The circuit court was clearly of the opinion that this fraudulent combination ought not to have been permitted to themselves receive the fruits of their cheat. But it was the opinion of the court that the provision of the statute contained in section 5, which declared that the franchise or privilege should finally be struck off, sold and granted by the governing body to the highest bidder therefor in gold coin of the United States, and that said successful bidder should be required to deposit with such governing body or such person as it might direct, the full amount of his or its said bid within 24 hours thereafter, and in case he or it should fail so to do then such franchise or privilege should be granted to the next highest bidder therefor, meant by this "next highest bidder" a bid already made, and that being the one which was in amount next after that forfeited by reason of the failure of the highest bid-

der to make the payment, and that all bidding was ended when the competitive bidding before the council made at the time of the opening of the sealed bids, had been put in. Not only that, but that this meaning of the statute is so plain, so obvious, so unequivocal, that no conditions existing in a particular instance, no argument that can be made against it, no rules of interpretation can be applied to it, for the purpose of overcoming that interpretation. In other words, that the case comes within the rule mentioned by the court which we have before quoted, namely that the language of the statute, when plain and unequivocal, determines its meaning regardless of consequences, and that in this case the statute is of such character that it admits of no other interpretation, that it is itself as plain as any language that could be offered in explantion or interpretation of it.

The court, in the course of its opinion and after disposing of the jurisdictional question, then states the defendants' objections to the validity of the alleged grant, and generalizes them under three heads, (1) that in the proceedings had by the city council of Los Angeles for the sale of said franchise, certain requirements of the act of 1901 were not complied with, and therefore there was no valid grant. (2) That the act of 1901 was void because it undertakes to delegate municipal functions to a special commission in violation of article 11, section 13, of the constitution of California; and (3), that if constitutional, it did not apply to the city of Los Angeles because it concerned only municipal affairs, and as to such affairs the city, by article 11, section 6, of the constitution

of California, as amended in 1896, is exempt from the operation of general laws, and subject only to its charter whose provisions require for *granting a franchise* the joint action by an ordinance of the council and mayor.

See Trans. p. 44.

The court then says that either of these objections, if good, is fatal to the alleged grant, and "I proceed at once to the consideration of the first."

And after saying that in determining whether the proceedings were lawfully complied with, the rule that the mode is the measure of power, and aside from the designated mode that there is no power, should be carefully observed, and also that in this particular case negative words were employed which gave to this rule its greatest force, namely, it was provided that the franchise should be granted upon the conditions in that act provided, and *not otherwise*, additional energy was imputed to these rules of construction by section 10 of the act of 1901, which we have already referred to, which made it a misdemeanor, and subjected a member of the council to be deprived of his office in case of a conviction of a violation, or attempt to violate, that statute by his vote.

Trans. pp. 44-45.

The learned judge of the court below then proceeds to consider the provisions of the act which bore more particularly upon the point of his decision. Those provisions are contained in the sections which we now quote.

"Section 1. Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street railroads upon any public street or highway, to lay gas pipes for the purpose of carrying gas for heat and power, to erect poles or wires for transmitting electric heat and power along or upon any public street or highway, or to exercise any other privilege whatever hereafter proposed to be granted by boards of supervisors, boards of trustees, or common councils, or other governing or legislative bodies of any city and county, city or town, within this state, except steam railroads and except telegraph or telephone lines doing an interstate business, and renewals of franchises for piers, chutes or wharves, shall be granted upon the conditions in this act provided, and not otherwise.

"Sec. 2. An applicant for any franchise or privilege above mentioned shall file with the governing or legislative body of the municipality an application, and thereupon said governing body shall, in its discretion, and when the application is accompanied with a petition praying that the same be granted, signed by the owners of three-fourths of the frontage of the real property fronting along and upon the route of the franchise applied for, must advertise the fact of said application, together with a statement that it is proposed to grant the same, in one or more newspapers of the city and county, city or town wherein the said franchise or privilege is to be exercised. Said advertisement must state that bids will be received for such franchise, and that it will be awarded to the highest bidder, and the same must be published in such newspaper once a day for ten successive days, if it be a daily news-

paper, and if there be no daily paper published in such city and county, city or town, then it shall be published in a weekly newspaper once a week for four successive weeks, and in either case the full publication must be completed not less than twenty (20) nor more than thirty (30) days before any further action can be taken thereon.

"Sec. 3. The publication must state the character of the franchise or privilege proposed to be granted, the term for which it is granted, and, if it be a street railroad, the route to be traversed; that sealed bids therefor will be received up to a certain hour and day named therein, and that the successful bidder and his assigns must, during the life of said franchise, pay to the municipality two per cent (2%) of the gross annual receipts of the person, partnership or corporation to whom the franchise is awarded, arising from its use, operation or possession. No percentage shall be paid for the first five (5) years succeeding the date of the franchise, but thereafter such percentage shall be payable annually; and in the event said payment is not made, said franchise shall be forfeited; provided further, that if the franchise be a renewal of a right already in existence the payment of said percentage of gross receipts shall begin at once.

"Sec. 4. In case the franchise granted shall be an extension of an existing system of street railroads, then the gross receipts shall be estimated to be one-half of the proportion of the total gross receipts of said system which the mileage of such extension bears to the total mileage of the whole system, and said estimate shall be

conclusive as to the amount of the gross receipts of said extension.

"Sec. 5. Said advertisement shall also contain a statement that the said franchise will be granted to the person, firm, or corporation who shall make the highest cash bid therefor; provided only, that at the time of the opening of said bids any responsible firm or corporation present or represented, may bid for said franchise or privilege a sum not less than ten per cent. above the highest sealed bid therefor, and said bid, so made may be raised ten per cent. by any other responsible bidder present, and the said franchise or privilege shall finally be struck off, sold and granted by said governing body to the highest bidder therefor, in gold coin of the United States, and said successful bidder shall be required to deposit with said governing body, or such person as it may direct, the full amount of his or its said bid, within twenty-four hours thereafter; and in case he or it shall fail so to do then the said franchise or privilege shall be granted to the next highest bidder therefor.

"Sec. 6. Work to erect or lay telegraph or telephone wires, to construct street railroads, to lay gas pipes for the purpose of carrying gas for heat and power, to erect poles or wires for transmitting electric heat or power, along or upon any public street or highway, or to exercise any privilege whatever, a franchise for which shall have been granted in accordance with the terms of this act, shall be commenced in good faith within not more than four months from the granting of any such franchise, and if not so commenced within said time said franchise so granted shall be declared forfeited, and shall be

completed within not more than three years thereafter, and if not so completed within said time said franchise so granted shall be forfeited; provided, that for good cause shown the governing or legislative body may by resolution extend the time for completion thereof, not exceeding three months.

"Sec. 7. The grantee of every franchise or privilege granted under this act shall file a bond running to said city and county, city or town, with at least two good and sufficient sureties to be approved by such governing body, in a penal sum by it to be prescribed and set forth in the advertisement for bids, conditioned that such bidder shall well and truly observe, fulfill, and perform each and every term and condition of such franchise, and that in case of any breach of condition of such bond, the whole amount of the penal sum therein named shall be taken and deemed to be liquidated damages, and shall be recoverable from the principal and sureties upon said bond. Said bond shall be filed with such governing body within five days after such franchise is awarded, and in case said bond shall not be so filed, the award of such franchise shall be set aside, and the same may be granted to the next lowest bidder, or again offered for sale, in the discretion of said governing body.

"* * * * * *

"Sec. 9. No clause or condition of any kind shall be inserted in any franchise or grant offered or sold under the terms of this act, which shall directly or indirectly restrict free and open competition in bidding therefor, and no clause or provision shall be inserted in any franchise offered for sale, which shall in anywise favor one

person, firm, or corporation, as against another, in bidding for the purchase thereof.

"Sec. 10. Any member of any common council or other governing or legislative body of any city and county, city or town of this state, who, by his vote, violates or attempts to violate the provisions of this act, or any of them, shall be guilty of a misdemeanor, and may be punished therefor, as provided by law, and may be deprived of his office by the decree of a court of competent jurisdiction, after trial and conviction."

Now the interpretation of the statute in this case was this: That sealed bids were to be received up to the time named in the advertisement, and providing that *at the time of the opening of said bids* any responsible firm or corporation present or represented might bid for such franchise a sum not less than ten per cent. above the highest sealed bid, and that bid might be raised ten per cent. by another, etc., and which franchise should finally be struck off, sold and granted to the highest bidder therefor in gold coin of the United States.

Then this bidder is required to deposit with the governing body the amount of his bid within twenty-four hours. If he doesn't, it should be granted to the next highest bidder therefor.

We here call attention to the last line of section 5 as it is printed in the transcript, where the language is that the "said franchise or privilege shall be granted to the next bidder therefor." This is a mistake, the word "highest" is omitted before "bidder."

In other words, according to the opinion of the circuit court, the first step in the proceeding is the advertising of the sale. Second, sealed bids. Third at the time they are opened, competitive bidding. Fourth, strike off to the highest bidder. Fifth, payment of the money within twenty-four hours. Sixth, in case of failure, then the council must look at the bids already in, and award to the highest of those thus remaining, unless, as was said in the opinion, there be good reason for not granting to him, and then the only proceeding possible to the council is to readvertise and sell, and therefore, no matter what the consequences may be, this was the limit of the council's power, and the acceptance of any bids, or entertaining any bids thereafter upon the same proceeding or advertisement was without authority.

An elaborate and ingenious and able argument is made by the learned judge in support of this interpretation, and the first thing to which we shall address ourselves is to reply to that argument, and endeavor to show that this interpretation is not admissible.

And now it is submitted that it is a rule universal that in construing the language of a statute or other instrument we are to consider the objects which it has in view, and its various clauses are to be construed in subordination to this purpose. It is not difficult to see what the main purpose—the main intent—of this act of the legislature of California is. It had for its object the sale of franchises to be exercised in municipalities, described in this statute as "city and

county or city or town." The proceeds of such sales to go into the revenues of the city. Such is the object of the statute, and to dispose of these franchises in the best manner and for the best prices, there were other provisions which were directed to securing fairness between competing bidders. The council itself was shorn of all power to bring into the advertisement any term or condition that would favor one person or corporation against another, or give any advantage in the bidding at all. To express it briefly, to sell for a price, and the best price obtainable, upon a fair sale, is written all through the statute, and is unmistakable.

Now these objects of the statute can all be defeated by anybody, at any time under any advertisement, if such a strict construction of the other provisions of the statute is to be indulged as were applied in this case in the circuit court. In the sale of street railway franchises, and we suppose in others, there may be two kinds of competitors having different objects in view. One class is where both or all competitors are bidding through a real desire to obtain the franchise, construct the road, and operate it. But another competitor in bidding may appear, not because he desires the franchise himself. He may have, and frequently does have, all the street railway franchises required or desired by him, and what he most wishes is to prevent competition with him. In the former case he is, of course, desirous of obtaining the franchise at the lowest possible price. In the latter case he is rather interested in defeating any sale at all.

Both of these interests of the bidder are directly opposed to the interests of the seller, and directly antagonistic to the aim which the statute seeks to accomplish. It is obvious, too, that under such provisions for the sale of property as are incorporated in this act, the real competition will, unless defeated by some trick, or device, which the statute undertook to prevent so far as the council is concerned, take place after the bids are opened and before the council. It is not likely that one who in good faith wishes to purchase, and is willing to pay a fair price, would discover by his sealed bid the extent to which he is willing to go, or the last dollar that he is willing to pay, and when dealing honestly it is evident that he would expect the competition to be developed after the bids were opened.

Now we see by such a device as was here resorted to by our adversary, and under the interpretation of the statute adopted by the circuit court, that anybody can defeat a sale altogether, or, if he desires a sale defeat any real competition by a device that amounts to nothing except a plain common cheat. Indeed, if we apply the same strict rule of interpretation to all of the provisions of this statute that were adopted by the learned circuit judge in his interpretation of the particular ones under consideration, a sale could have been absolutely defeated, and doubtless would have been, by the hocus pocus of these sealed bids had it not been for the presence of the complainant on the second day to overreach the bid of $139,000. "For," says the court, "if the money is not paid within twenty-

four hours the power of the council ended with the grant to the next highest bidder."

The next highest bidder was this same company, the Traction Company, for $139,000. Suppose there had been no opposition offered to them on the second day, and the franchise had been granted to the next highest bidder, namely, Davis, on the bid of $139,000, and suppose Davis failed to put up the money within twenty-four hours, then, we say that upon the same strict construction, the statute has made no provision either for any further bidding or for the acceptance of any other bid, and yet it manifestly intended to sell for money, and gold coin of the United States. When the legislature said that the franchises should be granted to the next highest bidder, it did not mean to say that it should be so granted whether he paid for it or not. The franchises must be granted "upon the conditions in this act provided, and not otherwise." And in section 2 of the act it is provided that the advertisement must state that bids will be received for such franchise, and that it will be awarded to the highest bidder. In section 5 that the advertisement is required to contain the statement that it will be granted to the person, firm or corporation who shall make the highest cash bid therefor. In the same section it is again said that it shall be finally struck off, sold and granted by the said governing body to the highest bidder therefor, in gold coin. In the same section it is said that if the amount of that bid is not put up in gold coin within twenty-four hours, it shall be granted to the next highest bidder therefor. And

certainly the purpose of the legislature was not so changed at this point as to command that it should be so granted without the payment of the sum bid. And so we say, applying the stringent rules of construction which were adopted in the court below, had it not been for the presence of the complainant on the second day, and in pursuance of the statute the council had made the grant to the next highest bidder, and he had failed, that would have ended the power of the council to proceed in the case at all, and thus the sale could have been defeated altogether, and whether that was the intention in this particular case or not makes no difference for the purposes of the argument, for it is manifest that by such a contrivance, the sale can be defeated, and by the contrivance adopted in this case, if the statute had been followed, although the sale might not have failed altogether, it would have gone to a bidder who had by this device prevented any competition from being made with him at the sale of the franchise. Nor is it at all necessary that these devices should be adopted in the sealed bidding. The same thing can be accomplished at the pretended competitive bidding, for suppose that two or more should combine for the purpose of preventing competition, or even defeating a sale, and sealed bids are presented by one or more of the combination. They are present when these bids are opened. Now if they find that they have the highest bid in there one can immediately arise and bid a sum so exorbitant as to end the competition at once. Or, if he has not the highest bid, one can raise the highest bid ten per cent. and another of the same combination put in

an extravagant bid which he knows no person who in good faith intends to pay the money, will raise it ten per cent., and he can fail to pay, thus throwing the property to his confederate, who may also fail if he chooses, and defeat the sale altogether. It is no answer to say that when the competing bidding commences that the competitor must be a responsible one. For the word "responsible" here can mean nothing more than one who is able to put up the amount of his bid if he desires to do so. Now the statute in this case, it will be observed, does not make any provision for recovering from a bidder the amount of his bid. By making the bid, he does not become personally obligated in a legal sense to pay the amount. The statutory consequences of the failure to pay within twenty-four hours is that it is awarded to the next highest bidder. There is no provision in this statute, as it is with reference to some judicial sales, that if the bidder does not comply with his bid the property may be resold and the difference recovered from him, and hence under this statute, in order to defeat its aims, all that is required is a person of financial responsibility and not troubled with any great deal of integrity. His financial responsibility doesn't make him liable to pay in the event that he refuses, but on the contrary, the statute itself has declared the consequences of the failure to pay the money, and that consequence is not that the party bidding and failing to pay shall be personally responsible for it. Hence we submit that it is perfectly obvious that under the construction adopted by the learned judge of the circuit court, the sole object of this statute

namely, the largest price at a fair sale, may be defeated at any time by the simplest form of cheat, and with no great difficulty a sale can be defeated altogether, and this now is accomplished by the construction of the very provisions of the statute which were designed to effect its main purpose, first of the sale, secondly for the highest price.

And we respectfully submit that before the mere detailed provisions for carrying the act into effect shall receive such a construction as to defeat the statute altogether and to prevent its having any effect, the language should be of such a character as would admit of no other possible construction. Indeed, we are not sure that the authorities would not amply justify us in asserting that if any such terms had found their way into the statute, they should be construed out of it rather than permitted to turn the statute into an absurdity. We are not without authority, as we shall hereafter show, for just such action were it necessary. But, is it necessary? The language is that if he fails to make the payment, then the said franchise or privilege shall be granted to the next highest bidder therefor. The construction put upon this term by the circuit court is that this next highest bidder must be found among the persons who have already made a bid upon that franchise, either a sealed bid or one made after the sealed bids are opened. That it did not contemplate any further bidding, and indeed is exclusive of any further bidding. But now this term "next highest bidder" is not a term that of itself points to any particular time, and more especially is not limited to a time past. When the statute said that the

advertisement must state that bids would be received for such franchise, and that it would be awarded to the highest bidder, no one would pretend that you could ascertain from the mere use of the words "highest bidder" the particular stage of the proceedings at which such bid should be ascertained. If we came to any conclusion upon this subject from the use of those words alone, we should suppose that the one who put in the highest bid at the conclusion of the bidding would be the person intended. But we find in section 3 that this person who is here called the "highest bidder" is also named the "successful bidder." We find this also repeated in section 5, where the franchise is to be finally struck off, sold and granted to the highest bidder therefor, in gold coin of the United States, and said *successful bidder* shall be required to deposit, etc. Here the successful bidder and the highest bidder are manifestly one and the same person.

And this successful bidder is required to deposit with the governing body or such person as it may direct, the amount of his or its bid within twenty-four hours; otherwise, the privilege shall be granted to the next highest bidder therefor. Now we submit that it is not a strained or unnatural paraphrase of this term, "the next highest bidder," to say that it is the person who next bids the highest, and that there is no necessary conclusion that the statute intended to put an end to all bidding except such as took place at the time that these bids were opened. In the argument of the case before the court below, our adversaries attempted to make much out of the proviso that *at the*

time of the opening of said bids, any responsible firm or corporation present may bid for such franchise or privilege, a sum not less than ten per cent., etc. And they said that by the use of this language, "*at the time of the opening of said bids,*" the legislature meant to exclude all bidding after that time. But now no such construction as that can be maintained. In the first place, the legislature manifestly did not mean at the precise time that the bids were opened that all competitive bidding should be concluded, for even the first bid could not be made for less than at least ten per cent. more than the highest of the sealed bids, hence the bids must have been opened and the highest ascertained before the bidding commenced. Furthermore, the legislature could not have meant that the bidding should end then and there, at that session of the council. The council could fix any time of the day at which the bidding should commence. As a matter of fact, it did in this case fix eleven o'clock in the forenoon of February 10th. It could just as well have fixed five o'clock in the afternoon of the same day. And contingencies might have arisen that would have carried the bidding over to another day necessarily, or else the sale have fallen through. And even commencing at eleven o'clock, there might have been ample reasons for the adjournment of the sale. Suppose the president of the council had fallen dead about the time the bidding should have commenced. Could not the council have adjourned until the next day without defeating all proceedings for the sale under that advertisement?

We say with respect to this phrase, that no such an interpretation as was contended for is at all necessary. One of the very definitions given in the dictionaries of the word "when" is, "at the time." Now it is no forced construction of this language to substitute its synonym, and the meaning is simply that when the bids are opened then any responsible firm, etc., can bid more than the highest bid. Indeed the court in its opinion in this case unconsciously, or at least indefinitely, adopts this word "when" as being the precise equivalent of the statute. Thus on page 47, the court says:

> "In the case at bar, therefore, when the sealed bids were opened and no bid of ten per cent. above the amount bid by Murray was then made, the action of the council," etc.

To be sure the court below did not adopt this narrow construction contended for by the counsel for the appelles, but the court does adopt a view not very different from that of the appellee, for, in the opinion, commencing on page 45 of the transcript, it is said:

> "The precise question here presented is this: When must the competition subsequent to sealed bids, for which said section provides, take place? To this question the first clause of the foregoing extract from said section makes answer as follows:"

Then follows a quotation from said statute which begins, "At the time of the opening of the bids," etc., and after quoting it, the court said:

> "This clause does not confine the time of com-

petition to the precise moment of the opening of such bids, but it does make it the next step in the series of steps prescribed by said section, and thus requires it to take place before the franchise has been struck off to the highest bidder. Said clause certainly does not contemplate that bidding shall continue after the franchise has been struck off. With that construction the clause would be meaningless.

"Again, the last clause of said section, which referring to default of the successful bidder in the matter of the deposit required of him, is as follows: 'And in case he or it shall fail so to do, then the said franchise or privilege shall be granted to the next highest bidder therefor,' forbids, by unavoidable implication, the idea that there can be any competition after such default. It will be observed that the words 'struck off, sold and,' used in a previous clause of the section, are omitted from the last clause. These words 'struck off' and 'sold,' which are ordinarily employed, and particularly appropriate to designate the closing of a public sale to the highest bidder such as that provided for by the clause where these words appear, would have been out of place in, and hence were designedly omitted from said last clause, for the reason that it provides for a contingency, namely, the failure of the successful bidder to deposit the amount of his bid, which can only arise after the bidding has been closed. When the bidding has been closed and the successful bidder declared, or, in other words, when the property has been 'struck off' and 'sold,' the next and last thing to be done is a formal transfer of ownership by such means as are suited to the particular case, and this final act is fully and

> accurately prescribed in said last clause by the use of the word 'granted.' Under said clause there is to be no striking off, no selling; those stages of competition have been passed; the only act to be performed is that of granting."
>
> Record, pp. 45-46.

Now, before calling attention to other arguments by which this position is sought to be fortified, we pause to answer this. Yet we should say first, that in quoting from the previous clause the very word which the court omits itself shows that the legislature had not any such distinction in its mind. The legislature did not stop with the words "struck off, sold and," but the very word necessary to complete the sense there is "granted," "struck off, sold and granted," and it is submitted that the omission of some of those words in the subsequent clause possesses no significance at all, and especially as we find that several different terms are used in this statute to express manifestly the same thing. Thus, in section 2 it is said that the franchise will be awarded to the highest bidder. In section 3 it is said that the character of the franchise or privilege proposed to be "*granted*" must be stated in the publication. In the 5th section, the said franchise will be granted to the person, firm or corporation who shall make the highest cash bid therefor. This is the first clause in the section, and it does not say "struck off, sold and," but simply that it will be "granted" to the person who shall make the highest cash bid therefor, and in the same section occurs the provision that if that person

does not pay the money in twenty-four hours it shall be granted to the next highest bidder.

Passing from the particular clause referred to by the court, we find in the same statute that after there has been the grant, that is, the money has been actually paid, if the bond is not given within five days, the award of the franchise shall be set aside, and the same may be granted to the next lowest bidder, or again offered for sale, in the discretion of the said governing body.

In section 9 it is said, "No clause or condition of any kind shall be inserted in any franchise *or grant* offered or sold under the terms of this act," as though the grant was the thing which had been sold.

It is obvious from these provisions that the legislature of California had not in its mind the notion of employing, with technical accuracy, these various terms, but the meaning of each of them wherever it is encountered is to be determined by considering the substance of the thing done, and in view of all the language of the act. In the interpretation of this act, we submit that it is not a fair construction to say that "struck off and sold" is the proper and appropriate expression for the first proceeding that takes place by the governing body upon this highest bid, for taking this act all together it is perfectly manifest that no title, no right of any kind, was intended to pass until the money was paid. Now the mere fact that the language of the statute is, or is supposed to be, that it should be struck off, sold and granted to this highest bidder, does not exclude the interpretaton

which we here contend for, because as we said before when we view all of the provisions of the act, we see that struck off, and sold, and granted, in that clause did not mean the vesting of the title. And in the event that he fails to pay the money, we are not told that the award shall be set aside as in the case of his failure to file the bond, but the provision is that the franchise shall be granted to the next highest bidder, and equally obvious is it that it was not intended to be granted to the next highest bidder except upon the payment of the money. But then again, while the statute in this respect is somewhat loosely constructed we submit that in the very phrase quoted whereby the learned judge of the court below conceived that there was a difference made between this first highest bidder and the next highest bidder, does not warrant the construction which the court was evidently putting upon it. For it will be observed that in section 5 where that phrase occurs the language is, "And said franchise or privilege shall *finally* be struck off, sold and granted by said governing body to the highest bidder therefor in gold coin of the United States."

Now this language is hardly susceptible of such an interpretation as to make it apply only to the person who was first ascertained to be the highest bidder, for it is *finally* to be struck off to the highest bidder, and furthermore in the very next clause of the sentence the language changes, "and said *successful* bidder shall be required to deposit." To us it seems obvious that the very provision of the statute referred to, is itself dealing with the person who is finally entitled under its provisions, to the grant of that franchise.

And furthermore, that it clearly was intended to be understood that if the first highest bidder fails to pay the money, and it is awarded to the next highest bidder, whoever he may be, or however ascertained, and he fails to pay within twenty-four hours, it shall go to the next. It is the finally successful bidder that the statute is contemplating, and not making a distinction between the first of several highest bidders, and all who come after him under that name.

Hence, if it be true that when the bidding has been closed, and the successful bidder declared; or, in other words, when the property has been struck off and sold, the next and last thing to be done is the formal transfer of ownership, it does not prove that there can be no further bidding after the property is first awarded to the first highest bidder. It is only after it is finally struck off to the really successful bidder under the statute that the bidding is closed. Under no other interpretation would the court below have been justified in saying that the next and last thing to be done is a formal transfer of ownership, and it is accurately expressed by the use of the word "granted," for we say again, that if the right to the grant does not accrue, the property is not sold, and it could not be granted until the money is paid. And this is shown by the subsequent provisions which we have already quoted with respect to the failure to give the bond. There the legislature recognized the fact that there has been an award and grant made of the property, and it is for that reason that if the bond is not forthcoming, the award of the franchise shall be set aside

Again: The court below says that on account of the fraud practiced by these fraudulent defendants the franchise ought not to have been granted to them, but that the only way said franchise could have been lawfully granted after its refusal to the next highest bidder was under and pursuant to a new advertisement. [Trans. p. 47.] But it is respectfully submitted that if we are to indulge in such strict construction, it could not have been granted under a new advertisement. The statute made no provision for a new advertisement except in one case only, and that is where the money had been paid, but the bond had not been filed. In that case, said the statute, the award should be set aside and the sale might be granted to the next lowest bidder, or again offered for sale, in the discretion of the said governing body. But this notice of the sale, or advertisement of their intention to sell, is the offer to sell, and as this is the only provision for offering it for sale again, it is submitted that the power of the council under this application for the franchise would have ended if the construction of the court below be correct, and it would have required a new application, and not merely to advertise it again.

Now, in the court below one of the arguments of the counsel for the appellees was that the acceptance of further bids was not intended, because presumably when the franchise had been struck off to one party, the competitors, or those who would have competed would, in all probability, return to their various homes or business, or pleasures, and would not have been on hand again on the 11th of February to enter into competition at the sale of the property; that they

would have supposed that the thing was concluded, and that no further bidding could take place. But it is submitted that this is not an argument for their construction of the statute, but on the contrary it assumes the construction, and this proposition is merely a reason for the provision of the statute. It has no validity as an argument to prove that that is the construction of the statute, for if the construction is not correct, then neither is the reason given for it correct. If when it is struck off to the first highest bidder, and the statute says that if he does not pay in twenty-four hours it shall be granted to the next highest bidder, if the meaning is, that if the party who has made this bid does not pay the money that then other bids may be received, then it would not be true that there would be any presumption that those who desired to bid would not return. If, in fact, it amounted merely to an adjournment of the council for twenty-four hours contingent upon the failure of the person to whom it was awarded paying the money, then they would be just as much bound to appear, and expected to appear, as though there had been a postponement from any other cause. And here we think that the provision of section 7 with regard to the failure to file the bond becomes significant. When the money has been paid and the property struck off, sold and granted, then it may fairly enough be supposed that those who have been bidding have retired not to return again, and that being the case, the statute has made a provision which it did not make with reference to the failure to pay the money, namely, the award is to be set aside and the franchise granted to

the *next lowest bidder or again offered for sale.* Now it has been boldly assumed that this term "next lowest bidder" was a mistake, a misprint, or an inadvertence, and that it really meant the next highest bidder. But it is obvious that it was no mistake at all and that the legislature meant just what it said, that it was the bid next *lowest*, and not the next highest bidder, that was intended here to be accepted, namely, it was a lower bid, but the one which came next after the highest bid. If any mistake in the use of a word at all, the word should have been "lower" instead of "lowest." But we submit that the legislature was there making a provision to meet a case just such as our adversaries have contended was being made in the first instance. The property has been paid for, struck off, sold and granted, and the bidders have gone about their business and five days are allowed for the filing of this bond, and no one is expected to remain in attendance upon the council from day to day, for that bond may be filed at any time during the five days, and just when cannot be known to anybody. The sale could not be postponed to a day and hour certain, and in that state of the case, the legislature said, "you may accept the next lowest bid, or you may offer it again." The language shows that a distinction was intended in the results of the two failures, the failure to pay the money, and the failure to give the bond, and the reasons for such distinctions are apparent and do not support the argument of the counsel for the appellees, nor the interpretation made by the court.

Another, as it seems to us, irresistible argument against the interpretation put upon the language of

the legislature by the court below is this: The statute has left us in no doubt of the intention to secure the highest price, and it has put such limitations upon the details of carrying out the object of the statute as it saw fit. The bidding is not bound to be kept open for bids in advance of a previous bid, only by an infinitesimal quantity, but it intended that bids ten per cent. in advance of the highest bid previously made should be accepted. Now, if one bid ten per cent. above all other bids, another person might be willing not only to give as much, but to give more, and yet not to give ten per cent. more than this bid, so that if he fails to put up the money and it goes to the bidder whose bid is already in and next in order, then the franchise has been sold to one, when another would have been willing to give not only ten per cent. more, but perhaps fifteen per cent more, but not twenty per cent. more than this next highest bidder. Yet he would have been compelled if he were to compete, to raise the highest of those bids ten per cent., and indeed, might be required to pay fifty per cent. more since, if the last bidder had raised the previous bid by twenty, or thirty, or forty or fifty per cent or even more, and then failed to pay the money, the franchise under the construction here adopted would go to the next bid already in, notwithstanding that a competitor present at the time of the bidding would have been willing to give twenty, or twenty-five or thirty per cent more. Nothing in the entire act is more manifest nor more plainly expressed than that the statute did not intend any such a result to be possible. It had secured fair competition, so far as any action of the council to pre-

vent it was concerned, and before we determine that they had left it to the bidders to defeat its objects at will, we say again that the language should admit of no other construction, and even then it would be impossible to reach the conclusion that the legislature had intended to permit any such thing.

> "If," said the court below, "the legislature had intended that there should be further competition after default of the successful bidder, it would have chosen apt words to express the intention rather than language which implies the contrary. And, besides, would have prescribed fully the nature and duration of the subsequent competition, that is, whether it was to be by sealed or open bids, and when it was to close."
>
> Trans. p. 46.

In all this, it is submitted, that the construction adopted is assumed. In other words, the construction is already reached before we come to this argument. This, we have considered before, and have called attention to the language of section 5 of the act, wherein the successful bidder is plainly synonymous with the person to whom it is *finally* struck off, sold and granted, and that he is not necessarily the person who, in the first instance, may have appeared to have the first highest bid, but it is not finally struck off, sold and granted, until he pays the money. And it is this person to whom it has been finally struck off, sold and granted and who therefore has paid the money, that is the successful bidder. If this is the true construction of the statute, the bidding is not closed until that successful bidder is reached. And, as we have before shown, it

is not until then that there is any provision for any further offering for sale, and then only in the case of a failure to file the bond within the time. And the only alternative to offering it for sale again, is that in the discretion of this governing body, it may be granted to the next lowest bidder. There the language excludes any further bidding except upon its being again offered, but that is not the case with the previous sections nor the previous conditions. And it is upon the interpretation of this clause that the widest differences exist in the interpretation of the statute. The learned circuit judge, after the paragraph which we have last quoted, then declares the various steps for which the section has provided, and arranges them consecutively, and they are as follows:

1. Opening of the sealed bids.

2. Opportunity for further competition in the manner and upon the terms prescribed in the section.

3. Striking off of the franchise to the highest bidder.

4. Allowance of twenty-four hours to the successful bidder to deposit the amount of his bid; and

5. In case such bidder fails to make the deposit, grant of the franchise to the next highest bidder therefor.

Record, pp. 46-47.

The learned judge does not quote the whole of the proceeding which he is assuming took place as the third step in the order. The language of the statute in the place to which he is manifestly referring is,

"is finally struck off, sold and granted * * *

to the highest bidder therefor in gold coin of the United States."

We do not, of course, deny that the statute is, if we look at the terms as they are employed, very difficult of interpretation. Undoubtedly in this section the person to whom it is finally struck off, sold and granted, would appear from the natural construction of the language to be one who might thereafter default in the payment, and the franchise or privilege be granted to the next bidder therefor. But as we have said before, the main intention and purpose of the statute is not obscure. And it never was the meaning of the statute that the franchise should be struck off, sold and granted, until the finally successful bidder has put up the money, and we contend that the bidding is not closed until the money is paid. The statute provides for the disposition of franchises by sale only. That sale must be for cash in gold coin of the United States, and no matter how loosely terms are employed, and how clumsy the literary performance, it is nevertheless obvious that the sale is for cash, and that it meant just what it said, and the twenty-four hour proposition did not destroy its character of a sale for cash, but was simply the prescription by which the statute defined its own term of a sale for cash. Suppose that the twenty-four hour clause had not been introduced, and that the language had been that the successful bidder should thereupon immediately pay the cash in gold coin of the United States. Now, would the true construction of the statute have been altered in the least except as to the meaning of the sale

for cash? And if this provision had been followed by the same terms that immediately follow the twenty-four hour clause, that if he failed to pay it immediately it should be granted to the next highest bidder, would that also exclude any further competition in case of failure? If the one making the highest bid had, immediately after it was struck off to him, said, "Well, I can't pay the money immediately, I shan't be able to produce it for a week hence," would the council then have no power to do anything but grant it to the one who had already bid next to this so-called successful bidder, notwithstanding that half a dozen persons might be standing about the council ready to raise that last bid twenty or twenty-five per cent? The error in the construction of the statute by the circuit court, if there be any, is in assuming that as soon as the highest bid was made after the sealed bids were opened, the statute had put an end to any further competitive bidding. The language does not necessitate such a construction, and the construction does defeat every object which the statute had in view. The court further said, in the opinion, that "the declaration of the council made after Murray's default, that he was a fraudulent and irresponsible bidder, and that his bid was null and void, is an immaterial circumstance. If such an inquiry was authorized, it must have preceded the order striking off the franchise to Murray, since said order necessarily determined the lawfulness of his bid, and there was no power in the council to review said order."

We are not disposed to contend that the council's assertion that Murray was a fraudulent and irresponsible

bidder, and his bid null and void is of any very material consequence. We suppose that the meaning of it was that the council had become aware that it had been the victim of a cheat, that it had suspended the bidding the day before to give space for the payment of the money by one who was nothing but a fraud, and who never had any intention of paying the money, and whose bid itself was a fraudulent device to prevent competitive bidding. If the council had not said so, it would have been admissible to show that that was the fact, provided the fact itself was of any consequence. We submit, however, that the court was mistaken in supposing that the inquiry must have preceded the order striking off the franchise to Murray for the reason that the said order necessarily determined the lawfulness of his bid, and that there was no power in the council to review said order. The provisions of the statute were evidently overlooked by the court upon this question of responsible bidders. The word "responsible" with reference to these bids does not occur except with reference to those who bid before the council after the bids are opened. Section 5, after saying that the franchise shall be granted to the person firm or corporation who shall make the highest *cash bid* therefor, then says,

> "provided only that at the time of the opening of the said bids any *responsible firm or corporation present or represented*, may bid for such franchise or privilege a sum not less than ten per cent. above the highest sealed bid therefor," etc.

And the statute has not anywhere else made the council the judge of responsible bidders, or given it any dis-

cretion as to the reception of bids that come in as sealed bids. And in this particular case the very existence of this Murray bid, shut off any bid from any person whom the statute required to be responsible, and the statute literally construed left the council in such case nothing to do except to strike off the franchise to this highest bidder, and the councilmanic proceeding subsequently with reference to Murray's bid was nothing more than a declaration of that which is now confessedly true, namely, that this fellow Murray didn't bid at all; that he put in before the council a fraudulent pretended offer to purchase this franchise for $415,000, and that his doing so was a device of other parties who already had bids in there, resorted to for the very purpose of defeating the right of the city and of the public generally to competition before the council as manifestly intended by the statute, and without any intention or any thought ever having crossed his mind of paying that sum, or any part of it. In other words, he wasn't a bidder at all. He was simply a man of straw in the hands of the Traction Company who was handling three bidders to accomplish its own fraudulent aims, and the very fact that the president of that company had put in a bid of $37,500 is strongly suggestive of what we have before conjectured, that but for the appearance of the Pacific Electric Railway in the case on the succeeding day, that company, the Traction Company, would never have paid the $139,000, nor offered to pay it.

Now, if the construction of the court below be the true one, then here the bidding has been closed by a fictitious proposal of a mere dummy in the hands of

those who were otherwise competing in the same bidding and designed to prevent any competition with the only person who was bidding at all on that side, namely, the Traction Company.

The bill alleges and the demurrer admits that in truth and in fact the bid of William S. Hook and the bid of E. A. Davis and the bid of E. Murray, were all on behalf of the Los Angeles Traction Company.

Trans. pp. 13-14, par. XVII.

And it is respectfully submitted that ingenious and able as the argument of the learned judge of the circuit court in support of the construction adopted is, it is not conclusive, and that the construction is erroneous, and is one by which a fraudulent device not only triumphs over integrity and fair dealing, but defeats the plain objects of the statute, and does give effect to a trick hatched out by ingenuity brooding upon fraud with the very intent to circumvent competition and defeat the very statute under which it was pretending to act. Once more we assert that the language which even admits of such a construction should not only be consistent with the interpretation, but exclusive of every other, and that it is well nigh impossible for it to be exclusive of any other, since it cannot be imagined that a legislature is deliberately framing a law and providing for its own circumvention. And as the object of all rules of interpreting statutes is to reach the intention of the legislature, it is impossible to impute such intention to the legislature. And if it be said that the construction is not the result of the presumed intention of the legislature, but results mere-

ly from an inadvertent omission of the legislature, we answer that unless absolutely driven to the conclusion we are not to suppose that there is any such omission. And while it may be true that no legislative ingenuity may be sufficient to exclude all possibility of deceit and fraud, yet the trick here resorted to is too obvious to be overlooked by the legislature, and if its success is possible under the language of the statute, it has not been because the legislature was oblivious to the possibility of such an attempt, but because the language of the act has not been sufficiently explicit to express the mind of the legislature. But the intent is plain, and should be carried into effect if the language will possibly admit of it.

Of course we do not dispute the proposition that where the provisions of a statute are susceptible of but one interpretation, that sense must be accepted, no matter what the consequences may be, but an interpretation of a statute which must lead to consequences which are mischievous and absurd, is inadmissible if the statute is susceptible of another interpretation by which such consequences can be avoided.

Suth. on Stat. Construction, Sec. 238.

Furthermore, in determining the meaning of any particular provision it is necessary to consider the entire statute, and we must proceed in the construction of the statute exactly as we should with any other proposition, and construe it with reference to the leading idea or purpose of the whole instrument. The general intent must be kept in view in determining the scope and meaning of any part. This survey and comparison

are necessary to ascertain the purpose of the act, and to make all of its parts harmonious. They are to be brought into accord if practicable, and thus if possible give a sensible and intelligible effect to each, in furtherance of the general design, and each should be so construed as a whole, and its several parts, as most reasonably to accomplish the legislative purpose. If practicable, effect must be given to all the language employed, and inconsistent expressions are to be harmonized to reach the real intent of the legislature.

Id. Sec. 239.

And Mr. Sutherland, in the section last cited, quotes the following from Pollock, C. B., in Attorney General vs. Sillen, 2 H. & C. 515:

> "To discover the true construction of any particular clause of the statute, the first thing to be attended to, no doubt, is the actual language of the clause itself as introduced by the preamble; second, the words or expressions which obviously are by design omitted; third, the connection of the clause with other clauses in the same statute, and the conclusions which, on comparison with other clauses may reasonably and obviously be drawn. * * * If the comparison of one clause with the rest of the statute makes a certain proposition clear and undoubted, the act must be construed accordingly, and ought to be so construed as to make it a consistent whole. If after all, it turns out that that cannot be done, the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail."

Mr. Sutherland also well expresses the general principles of interpretation, and especially the importance of keeping in mind the main intent of the statute, and of construing all of its particular provisions as having been designed to accomplish that general intent, and the effect which this principle has on the interpretation of the various clauses of the statute. The presumption is that the lawmaker has a definite purpose in every enactment, and has adopted and formulated the subsidiary provisions in harmony with that purpose; that they are needful to accomplish it, and that if they have the intended effect, they will at least conduce to effectuate it, and that general purpose is an implied limitation on the sense of general terms, and a touchstone of narrower terms. It gives sense and scope to the minor provisions, and from this assumption the general rule that the cardinal purpose is that all the parts be treated as a whole, that they are to be brought into harmony, if possible, and so construed, but if a word in the statute should make the clause in the statute in which it occurred unintelligible, the word should be eliminated, and the statute read without it.

Id., Sec. 240.

Words and clauses in different parts of the statute must be read in the sense which harmonizes with the subject matter and general purpose of the statute.

No clearer statement, says Mr. Sutherland, has been, or can be made of the law as to the dominating influence of the intention of the statute in the construction of all its parts than that which is found in Kent's Commentaries:

> "In the exposition of a statute the intention of the lawmaker will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter. When the words are not explicit the intention is to be collected from the text; from the occasion and necessity of the law; from the mischief felt, and the remedy in view; and the intention is to be taken or presumed, according to what is consonant with reason and good discretion."

Sutherland continuing says that if, upon examination, the general meaning and object of the statute be found inconsistent with the literal import of any particular clause or section, such clause or section must, if possible, be construed according to that purpose. But to warrant the change of the sense according to the natural reading to accommodate it to the broader or narrower import of the act, the intention of the legislature must be clear and manifest. The application of particular provisions is not to be extended beyond the general scope of a statute unless such extension is manifestly designed. Legislatures, like courts, must be considered as using expressions concerning the thing they have in hand; and it would not be a fair method of interpretation to apply their words to subjects not within their consideration, and which, if thought of, would have been more particularly and carefully disposed of. The mere literal construction ought not to prevail if it is opposed to the intention of the legislature apparent from the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention can be better ef-

fected, the law requires that construction to be adopted. The intention of an act involves a consideration of its subject matter, and the change in, or an additon to the law which it proposes; hence the supreme importance of the rule that a statute should be construed with reference to its general purpose and aim.

Sutherland, Sec. 241.

This is followed by many illustrations of the application of these principles to the interpretation of statutes, and in many of them the court reached results which were of far greater deviation from the mere dictionary meaning of words than any that we have suggested in this case. In one of them the effect of this comparison with the context led to the conclusion that birds were not live animals. Reiche v. Smythe 13 Wall. 162. In another case a minor with living parents was held to be an orphan, Ragland v. Justices, 10 Ga. 65, 71. A jury was construed to mean one or more credible and disinterested persons sworn by an officer executing a writ of replevin to testify to the value of property, Williams v. McDonald, 3 Pinney 331.

Sutherland, Secs. 242-244.

The natural import of words is their literal sense but this may be greatly varied to give effect to the fundamental purpose of a statute. In construing statutes courts look at the language of the whole act, and if they find in any particular clause an expression not so large and extensive in its import as those used in other parts of the statute, if, upon a view of the whole act they can collect from the more large and extensive

expressions used in the other parts the real intention of the legislature, it is their duty to give effect to the larger expression.

Sutherland, Sec. 245.

The mere literal construction of a section in the statute ought not to prevail if it is opposed to the intention of the legislature, *apparent by the statute*, and if the words are sufficiently flexible to admit of some other construction, it is to be adopted to effectuate that intention. General words or clauses may be restricted to effectuate the intention or to harmonize them with other expressed provisions. Where general language construed in a broad sense would lead to absurdity it may be restrained. The particular inquiry is not what is the abstract force of the action or word they may comprehend, but in what sense they were intended to be used as they are found in the act. The sense in which they were intended to be used furnishes the rule of interpretation, and this is to be collected from the context; and a narrower or more extended meaning is to be given according to the intention thus indicated.

Sutherland, Sec. 246.

Innumerable authorities are cited by Mr. Sutherland for these various propositions, but we suppose that really no authority was necessary, since the rules which are laid down are elementary, and these particular sections have been cited mainly because they express as clearly the rules upon which we rely and their applicability to the present case as they can be found expressed anywhere, and more than that, they

mark the different points of view from which these provisions of the statute under consideration have been regarded by the court, and counsel for the appellee, and those upon which we insist. Of course if we are mistaken in our main proposition, that mistake will go far to remove the force of these rules of interpretation. But it is again respectfully submitted that the legislature has not left its main purpose, its general intent, in the least obscure. This statute marked by a series of phrases, and in different provisions, that the legislature was providing for the sale of franchises to the highest bidder for cash in gold coin, and the sale conducted in such a manner as that there should be a fair competition between bidders, and unless the terms of this statute are such that it has so distinctly marked that the bidding shall be stopped at the perpetration of a trick by a common cheat, although the result is to defeat every object of the statute, no matter how clearly expressed, then we submit that the interpretation given by the learned judge of the court below is a mistake. But what we contend for, is that such a conclusion can only be warranted by language of the overwhelming force which the learned judge of the circuit court thought should be given to the language in this section 5. That is to say, it is so clear, so explicit, that it not only suggests at once the construction which was given to it by the circuit court, but absolutely excludes every other possible interpretation. Even then, we reiterate that it is, to say the least of it, questionable whether the meaning would not be so absolutely repugnant to the plain intent of the

statute as to justify the court in forcing a construction upon it consistent with that main intent. Courts have, as is shown by Mr. Sutherland, and examples of it could be multiplied *ad infinitum*, absolutely rejected words, the meaning of which were too plain and too exclusive to admit of any other interpretation, but for the very reason that they made shipwreck of the plain purpose of the statute, they have been ignored and rejected altogether, and the statute read as though they were not there. And it is submitted to the court that we are here confronted wtih a statute the object of which is plain, the intent unmistakable, and without language that necessitates the absolute defeat of that intent and purpose, and that the appellant in this case complied with every provision of the statute. The application was for the sale of the franchise, the council exercised its discretion and advertised it in the manner prescribed by the statute, the bidding took place fairly and openly as soon as the obstacle to competitive bidding before the council was removed, and which obstacle consisted of the insertion of a fraudulent bid of a straw man, and that the bid made by the appellant was accepted by the council, the cash in gold coin paid into the treasury of the city with the sanction, and under the direction, of the council itself, and thereupon the franchise was finally struck off, sold and granted to the appellant, and within the time prescribed by law it presented a bond in the amount, with sureties approved by the council, and under its direction filed in the archives of the city. That thereupon everything was done which under the statute was required to be done in order to vest the title of the property thus

sold, in the appellant, and that the acts of the council pretending to vacate and set aside that grant, and to offer the property again for sale, and to employ the entire police force of the city in a forcible resistance to the exercise of the franchise which had been granted, were in violation of the constitution of the United States.

As we have before shown, the council of the city was vested with precious little discretion in the administration of this act. When the application was presented to it not being accompanied by the petition mentioned in section 2 of the act, the council did have the discretion of advertising it or not, as it saw fit, but it exercised this discretion, and having once exercised it, the discretion was exhausted.

Santa Rosa Lighting Co. v. Woodward, 119 Cal. 30, 32.

But it had no further discretion under the act until the money was paid, the franchise granted, and there was a failure to file the bond, which contingencies never occurred in this case, and therefore, the council never had any further discretion in the matter. It had no power to reconsider its action for any cause, whether a veto of the mayor or any other thing. And if the granting of this franchise to the appellant was not absolutely void for the want of power, all action of the council taken for the purpose of reviewing or rescinding its action, or attempting to interfere with the exercise of the privileges granted, was without any authority whatever.

To our minds the opinion of the learned judge of

the circuit court upon the question considered and decided by that court has presented the case of our adversaries in its strongest possible light, and that decision fortified by an argument to which no additional strength can be given, upon that question, nor the cause of our adversaries put in any stronger light upon any other question, and it is for this reason that we have devoted so much time and space to the question decided by the circuit court.

But, nevertheless, as the other questions argued by them are still debatable in this court, we shall now give some consideration to such of them as appeared to be most strongly relied upon in the court below.

The question presented by the demurrer for uncertainty in the bill, raised by the city and its council and mayor, we scarcely think requires any reply other than the bill itself. The ground of demurrer is that it cannot be determined from the bill what number of franchises is embraced in the notice of sale set forth in paragraph XII of said bill, whether one or more and that it cannot be determined what number of franchises were offered for sale, sold or granted by the sale pursuant to the notice of sale. To which we answer the notice of sale is set forth in the bill in full [Record pp. 6-13, par. XII]. Being set forth in full, the question of whether or not there was more than one franchise offered would seem to be determinable from the notice itself, and to be a mere question of law, and not of fact, and that any attempt by the complainant to enlighten the city and its officers, and its council and mayor upon this subject would be simply the expression of the complainant's legal opinion which,

however luminous for other purposes, would, in legal contemplation, add nothing to the force of the bill as a pleading. Nor do we see that it makes any difference whether the notice contains one or more franchises. The first section of the act provides that every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street railroads upon any public street or highway, or lay gas pipe for the purpose of carrying gas for heat and power, etc., along or upon any public street or highway, or to exercise any other privilege whatever hereafter proposed to be granted, etc., shall be granted upon the conditions in this act provided, and not otherwise.

Now we do not suppose that this act is to be construed so narrowly as to mean that in granting a franchise for any of these things say for the purpose for which the present application was made, operating a street railway, means that every time a corner is turned that a new franchise arises, and that they must be sold separately, nor that the statute was meant to confine the sale of the franchise to a single franchise of a particular kind. It has been said that the right to dig up the streets of a city for any purpose is a franchise. That the right to construct a railway thereon is a franchise, that the right to operate a street railway or any other, and to take tolls therefor, is a franchise. And so there are many others, and several of them are necessarily included in the construction and operation of a street railway, and to suppose that the legislature meant by the employment of the singular number here to limit the sale to a single franchise, and when it was said, "upon any street" in the city it meant that it

must be confined to one street, or every time it entered upon another there was a new and additional franchise requiring a separate advertisement and sale, is another method of construing the statute by which it becomes purposeless and absolutely impossible of any practical application to anything.

It will be noticed, too, that this uncertainty is pleaded only by the city and its mayor and council, the council being the very body that prepared the notice and published it, and the mayor the officer who assumed to veto it. The Traction Company, who had three different persons bidding on this franchise in its own interests, did not discover any such uncertainty in it, and do not demur upon that ground.

Trans., pp. 32-33.

It was not too uncertain for the council to offer it for sale, nor to prevent the Traction Company from entering into competition for the purchase of it, nor even to take pains to prevent others from competing with it. Nor was the objection considered by the circuit court as worthy of any mention, nor do we think that that particular objection is of any consequence here.

But it was claimed in the court below by the appellees that in our statute to a valid grant under the laws of the state of California, a valid ordinance granting the same was necessary, and that that ordinance must be approved by the mayor. That an ordinance was drafted in this case, and passed by the council, and was vetoed by the mayor, and that hence no rights ever accrued to the appellant under the said proceedings.

The particular provisions of the charter of the city of Los Angeles, so far as necessary to an understanding of the question involved here, are the following:

In section 12 of Article III, it is provided: "All legislative power of the city is vested in the council subject to the power of veto and approval by the mayor as hereinafter given, and shall be exercised by ordinance; other action of the council may be by order upon motion."

In section 16 of the same article, it is provided that no ordinance shall be passed or other act done granting a franchise * * * unless two-thirds of the members of the whole council vote in favor thereof.

Article 3, sec. 16.

It is further provided that upon the granting of franchises a journal shall be kept, and the ayes and noes taken.

See Stats. of 1889, page 462-463.

Sections 37 and 38 of Article III are as follows:

"Sec. 37. Every ordinance which shall have been passed by the council shall, before it becomes effective, be signed by the city clerk or other person authorized by the council to sign the same on its behalf, and be presented to the mayor for his approval and signature, if he approves it; if not, he shall indorse thereon the date of the presentation to him and shall return to the city clerk with his objections in writing. The city clerk shall indorse thereon the date of its return to him, and shall, at the first meeting of the council thereafter, present the same, with the objections of the mayor, to that body. Thereupon the council shall proceed to reconsider the passage of the

ordinance. Upon such reconsideration, in all cases where the votes of two-thirds of the whole council are required to pass the ordinance in the first instance, it shall require the votes of three-quarters of the whole council to pass the ordinance over the mayor's veto. In all other cases it shall require the votes of two-thirds of the whole council to pass the ordinance over the veto. The vote in all cases of reconsideration, shall be by ayes and noes, and the names of the members voting for or against shall be entered upon the journal.

"Sec. 38. If any ordinance shall not be returned to the city clerk by the mayor with his objections in writing, within ten days after it shall have been presented to him, it shall become effective and be as valid as if the mayor had approved and signed it."

Stats. of 1889, p. 465.

Now, turning to the act of 1901, we say in answer to the proposition that the mayor had anything to do with it, that the statute excludes the possibility of any such a construction. The very first section says that every franchise or privilege, etc., shall be granted upon the conditions in this act provided, and not otherwise. It will thus be seen that when the conditions arise, the council itself has no option, no discretion, in the matter. It then prescribes the procedure. The first step is an application. If this application is unaccompanied with a petition signed by the owners of three-fourths of the frontage of the real property along the route of the franchise, praying that the same be granted, then the governing body has a discretion, but that discretion is simply whether or not it will grant the franchise at all. There the statute says that it shall, in its

discretion, and when the application is accompanied by this petition, it must advertise the fact of the said application, together with the statement that it is proposed to grant the same, etc.

See sec. 2 of the act.

Here is the only discretion allowed the council at all, until after sale, and this application not being accompanied with such a petition, it was in the discretion of the council to refuse to advertise the same at all, but it exercised its discretion by advertising the franchise for sale. Having done so, one of the very things which they were required to state in that advertisement, and which they did state, was that bids would be received and it would be awarded to the highest bidder, and that the franchise would be granted to the person, firm or corporation who should make the highest cash bid therefor.

See sections 2 and 5 of the act.

And the act itself declares that the franchise or privilege shall finally be struck off, sold and granted by the said governing body to the highest bidder therefor, in gold coin. That if the first of the highest bidders did not pay within twenty-four hours it should be granted to the next highest bidder therefor. If the bond were not filed, the award shall be set aside.

Now, between the presentation of the application and this point, no discretion has been left to the council at all.

The next and last place where the council has any discretion is when the money has been paid, and the bond has not been filed within the time. Then again

it may grant it to the next lowest bidder, or again offer it for sale at its discretion.

It is absurd, we submit, to say that the mayor had the power to forbid the council's doing a thing which the legislature said it should do, and forbid it, too, when the very conditions upon which it became the legal duty of the council to do the thing had actually occurred, and those conditions must always have arisen before the right of approval or disapproval of the mayor arose, if he had such right. And thus this argument means that the legislature says you shall, but the mayor may say that you shall not. There is nothing in the act from which any such inference could arise.

But again. Section 37, which gives this veto power, also states the manner in which he shall exercise it. And section 38, already quoted, declares that if the mayor do not return it with his objections in writing within ten days, it shall become valid and effective as though he had approved it. In other words, the veto power given here follows the general rules found in the constitution of the United States, and of the various states of the Union, namely, he has ten days within which to exercise it. But the statute of 1901 requires that it shall be struck off, sold and granted, as we contend, immediately upon the payment of the money, and if not at that time, then at a still earlier time, namely, immediately, upon the highest bids being made, and the money is to be paid within twenty-four hours, and the bond filed within five days after the award, so that under any construction, no more than six days can intervene between the striking it off and

the taking of the final step by the purchaser by which his title becomes absolutely vested beyond the right of anybody to interfere. Yet, according to the charter the mayor may brood over this matter for ten days before exercising his alleged right to veto.

Furthermore, there is no uncertainty as to what the act means with reference to the tribunal which is to make this sale. Every franchise, etc., proposed to be granted by *boards of supervisors,* boards of trustees or common councils or other governing or legislative body of any city and county, city or town, within this state, etc.

Now, these terms manifestly were employed with reference to these political corporations in the state of California. The city of San Francisco is a combination of a city and county government, and its corporate name is, the City and County of San Francisco, and its legislative body is called a board of supervisors. And this statute evidently has reference to this city and county government, and its legislative body of a board of supervisors.

The next name of the legislative body is, boards of trustees, a very common name in this state, as is also common councils, and the council of the city of Los Angeles was for many years known and called the "common council," but now it is called the "council" merely. And thus the legislature, after employing these more common terms, in order to embrace others by whatever name they might be called, said, other governing or legislative bodies. It was therefore referring to these boards of supervisors and boards of trustees

and common councils as the governing or legislative body.

The second section provides that an application for any franchise or privilege shall be filed with the governing or legislative body of the municipality, and thereupon said governing body shall, in its discretion etc. Here again it is obvious that the governing or legislative body, and the governing body, were used by the legislature in exactly the same sense, and to mean the same thing, and did not include the mayor. The title of the act is, "An Act providing for the sale of street railroads and other franchises in municipalities, and providing conditions for the granting of such franchises by legislative or other governing bodies and repealing conflicting acts."

And, as already stated, in the very first section it mentions by name certain tribunals which it is evidently regarding as the legislative or governing body.

No reason that we have discovered exists for supposing that the terms used in this act, "legislative or governing body" or any of the other phrases which it has used to express the same thing, were used in one sense in one part of the act and another in any other. It is evident that the terms are used in the same sense all the time. When it is said that "the application for any such franchise or privilege shall be filed with the governing or legislative body," it is manifest that the mayor is not included. And when a discretion is given to the governing body as to advertising the fact of said application, it is again perfectly plain that the mayor is not included, and when, as we proceed, we find specific directions govern-

ing the action of this body, whatever it may be, down to and including the actual striking off, selling and granting the franchise, all of which said acts are to be done by this governing body, and in which, as we have repeatedly said before, it had no discretion after once entering upon the advertising of the franchise, it is, if possible, still more obvious that no action of the mayor was contemplated by this statute, and to say that after all had been done, the money paid, the bond given, some other and further act by some governing or legislative body which, by a strained construction, is to include the mayor, was necessary to the vesting of this franchise, cannot be wrought out of the language of the act itself. And indeed, as we understand our adversaries, they do not seriously claim that this statute, if read alone, could be so construed, but they tell us that the charter of this city provides that in order to grant any franchise an ordinance is necessary, and that every ordinance must, by that same charter, be approved by the mayor, or if disapproved, passed over his veto in the manner pescribed by the charter. And then we are further told that the charter of the city of Los Angeles, being one which was framed by a board of freeholders under the provisions of the constitution of the state of California, and approved by the legislature, is the law of this city in reference to all municipal matters, and does itself control any general law of the legislature in municipal matters, and therefore that if the act of 1901 is not susceptible of the construction for which we are here contending, namely, that the mayor is not included in the term "governing

body," then the statute is, so far as the city of Los Angeles is concerned, void.

But before passing to this last question, we call attention to the case of Jacobs v. Board of Supervisors, 100 Cal. 121. In that case the board of supervisors of the city and county of San Francisco, in the exercise of the powers given it by the constitution of the state, had fixed the water rates to be charged in the city of San Francisco by an ordinance passed by the board, and the mayor had vetoed it, and this proceeding was instituted to compel the board of supervisors, by a writ of mandamus, to proceed to act upon the mayor's veto, and if they didn't pass the ordinance over his veto, then to proceed to fix the rates. The provisions of the constitution upon which the determination of the question there involved depended, are contained in Article XIV of the constitution of the state of California. In section 1 of this article it is declared:

> "The use of all water now appropriated or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use and subject to the regulation and control of the state in the manner to be prescribed by law; provided that the rates or compensation to be collected by any person, company or corporaton of this state for the use of water supplied to any city and county or city or town or the inhabitants thereof, shall be fixed annually by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordi-

nances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the 1st day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates where necessary within such time shall be subject to a peremptory process to compel action at the suit of any party interested and shall be liable to such further processes and penalties as the legislature may prescribe."

The remainder of the provision declares the forfeiture of the works to the city for collection of rates other than those so fixed, and in the case of Jacobs against the Board of Supervisors, *supra*, the supreme court said:

> "A constitution," said the court, "must be read, interpreted and expounded in the same manner by the same means and methods, which are appropriate to all other legislative acts. * * * Now it is clear that there should be no such a construction of language as would lead to absurd or impracticable results, or compel a court to decree a thing substantially impossible, or which is in plain violation of fundamental principles of law or equity firmly established and universally recognized, unless such language absolutely requires such construction. The judgment in the case at bar first commands appellants to act upon the objections of the mayor which we presume means to vote formally on the question whether the veto should be sustained; and then assuming that there may not be nine votes in favor of the order, commands them forth-

with to proceed to fix the rates. If they should vote on the veto and a majority of the supervisors, but not nine, should vote for the order, of course under the judgment they would be compelled to proceed and pass another order and if that should be vetoed with the same result, then another and another, and so on indefinitely. So that if the board should not yield its views to those of the mayor there could be no legal fixing of water rates at all. But the section of the constitution in question provides that the water rates *shall be fixed annually*, to commence on July 1st and that any board or body failing to do so shall be subject to process to compel action, and that any person collecting water rates otherwise than so fixed annually shall suffer certain penalties and forfeitures. If such a construction does not involve a palpable absurdity or an attempt to accomplish an absolute impossibility it certainly does lead naturally and probably to what is substantially impracticable and to a failure to consummate the constitutional provision under review."

100 Cal. 127-128.

The argument here made against the existence of the veto power of the mayor upon an ordinance fixing the water rates applies with tenfold force against the existence of any such veto power by the mayor in the present case. In fixing water rates the board of supervisors are invested with a discretion. Indeed, subject to certain well known limitations upon the power, the rate to be fixed is absolutely within the discretion of this tribunal, whatever it may be that is clothed with this power, yet nevertheless the consti-

tution said that they should fix a rate, and that it should go into effect on the 1st of July, and that if they didn't fix the rates in February, they could be made to fix them by the writ of mandamus. But, as we have before said, there was no discretion in the council of the city of Los Angeles or any other municipality in this state, except that discretion which we have so often referred to, and when the council exercised its discretion it was, as we have shown, exhausted, and thereafter it was to proceed, not according to its discretion, but the various steps to be taken by the council were determined by the statue itself, and the council was left no discretion at all, and we are not to construe the statute in such a manner as to lead to absurdities, and to suppose that they are required to go through the absurdity of submitting to the mayor for his approval that which the legislature itself had already determined, and to say that the mayor must stamp upon it his consent in order that it should have the operation which the statute said that it shall have, is nothing more or less than an absurdity.

Now, the claim that under the interpretation which we have here suggested, the act is in violation of the constitution of the state of California, and void, is wrought out of the provisions of the constitution of the state of California, and the charter of the city of Los Angeles framed as it was by a board of freeholders. The provisions of the constitution out of which this conclusion is reached are the following:

> Article XI, Sec. 6: "Corporations for municipal purposes shall not be created by special laws; but the legislature by general laws shall provide for the incorporation, organization and classification in proportion to population of cities and towns, which laws may be altered, amended or repealed. Cities and towns heretofore organized or incorporated may become organized under general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities and towns heretofore or hereafter organized and all charters thereof framed or adopted by authority of this constitution, *except in municipal affairs*, shall be subject to, and controlled by, general laws."

We have underscored the words "except in municipal affairs" for the reason that this was introduced into the constitution by the amendment adopted November 3, 1896. Prior to that time this exception did not exist, but it was declared generally that "all charters thereof framed or adopted by authority of this constitution shall be subject to, and controlled by, general laws."

The next provision, and one of great importance in the argument of counsel for the appellees, is section 8 of article XI. This section has undergone many changes. It originally provided that a city containing a population of more than one hundred thousand inhabitants might frame a charter for its own government, but now it is declared:

> "Any city containing a population of more than three thousand five hundred inhabitants may frame a charter for its own government, consist-

ent with, and subject to, the constitution and laws of this state, by causing a board of fifteen freeholders who shall have been for at least five years qualified electors thereof, to be elected by the qualified voters of said city, at any general or special election, whose duty it shall be, within ninety days after such election, to prepare and propose a charter for such city, which shall be signed in duplicate by the members of such board, or a majority of them, and returned, one copy to the mayor thereof or other chief executive officer of such city, and the other to the recorder of the county. Such proposed charter shall then be published in two daily newspapers of general circulation in such city for at least twenty days * * * provided that in cities containing a population of not more than ten thousand inhabitants, such proposed charter shall be published in one such daily newspaper; and within not less than thirty days after such publication it shall be submitted to the qualified electors of said city at a general or special election, and if a majority of such qualified electors voting thereat shall ratify the same, it shall thereafter be submitted to the legislature for its approval or ratification as a whole, without power of alteration or amendment. Such approval may be made by concurrent resolution, and if approved by a majority vote of the members elected to each house, it shall become the charter of such city, or if such city be consolidated with the county, then of such city and county, and shall become the organic law thereof, *and supersede any existing charter* and all amendments thereof, and all laws inconsistent with such charter. A copy of such charter certified by the mayor or chief executive officer,

and authenticated by the seal of such city, setting forth the submission of such charter to the electors and its ratification by them, shall, after the approval of such charter by the legislature, be made in duplicate and deposited, one in the office of the secretary of state and the other, after being recorded in said recorder's office, shall be deposited in the archives of the city, *and thereafter all courts shall take judicial notice of said charter.* The charter so ratified may be amended at intervals of not less than two years by proposals therefor submitted by the legislative authority of the city to the qualified electors thereof at a general or special election held at least forty days after the publication of such proposals for twenty days in a daily newspaper of general circulation in such city and ratified by at least three-fifths of the qualified electors voting thereat, and approved by the legislature as herein provided for the approval of the charter. In submitting any such charter or amendments thereto, any alternative article or proposition may be presented for the choice of the voters and may be voted on separately without prejudice to others."

In 1888 a board of freeholders chosen by the electors of the city of Los Angeles in the manner here provided in the statute, and consisting of fifteen members, prepared a charter for the city of Los Angeles, which was submitted to the electors of the city, and approved by them, and on the 31st day of January, 1889, the charter was approved by the legislature of the state of California, and is set forth in the statutes of 1889, pages 456-512.

In Article III the charter deals with the powers and duties of the council.

Section 12 of this article [Stats. of 1889, p. 462] has already been set out in this brief. It is the section by which it is declared that all legislative power of the city is vested in the council, subject to the power of veto and approval by the mayor, and it will be seen that by the provisions of this section the mayor is not made a part of the legislative power, but the full extent of his powers or duties with respect to legislation is simply that of the exercise of a veto.

Section 15 of Article III provides that the enacting clause of all ordinances shall be substantially as follows:

The mayor and council of the city of Los Angeles do ordain as follows:

Section 16, Article III, statutes of 1889, page 462, is as follows:

> "Six members of the council shall constitute a quorum for the transaction of business, but no ordinance shall be passed or other act done, granting a franchise, making any contract, auditing any bill, ordering any work to be done or supplies furnished, disposing of or leasing the city property, ordering any assessment for street improvement or building sewers, or any other act to be done involving the paying of money, or the incurring of debt by the city, unless two-thirds of the members of the whole council vote in favor thereof. All other ordinances may be passed by vote of a majority of the whole council."

The number of councilmen in this city is nine, so that it will be observed that under the charter provi-

sion it requires a two-thirds vote to do the things mentioned in this section 16.

Section 37, which provides that every ordinance which shall have been passed by the council shall, before it becomes effective, be signed by the city clerk and presented to the mayor for his approval or signature, we have already quoted in full. And also section 38, which provides that if the ordinance is not returned by the mayor with his objections in writing within ten days, it shall become effective and be as valid as if the mayor had approved and signed it.

From these various provisions it is argued that the granting of franchises under this act of 1901 is a municipal affair; that by the provisions of the constitution of the state of California the charter of the city of Los Angeles is not controlled or affected by acts of the legislature so far as municipal affairs are concerned, but on the contrary the charter itself is controlling; that hence in the granting of the franchise here provided for, our charter declares that it could only be by ordinance, and that the mayor possessed this veto power, and that so far as the mode of making the grants is concerned, we are to look to the provisions of the charter, and not to those of the general law, and that, as it is shown by the bill that this franchise never was granted in the mode prescribed by the charter, no rights ever vested in the appellant in or to the rights, privileges, franchises and property purporting to have been struck off and granted to it as hereinbefore set forth, and if, upon the face of the act of 1901 it appears that this peremptory mandate that

the governing body shall finally strike off, sell and grant to the successful bidder the franchises advertised are so essentially connected with, and inseparable from, the provisions of the act for the disposition of the franchises referred to therein that it cannot be supposed that the legislature would have passed the act except with that provision, then the act is, at least so far as the city of Los Angeles and other municipal corporations having freeholders' charters directing some other mode of granting franchises are concerned, in violation of the constitution of the state of California, and void. But it is submitted that this is a mistake. The charter of the city of Los Angeles does not give to the city of Los Angeles the power to grant a street railway franchise at all, and what is more, such a power never was vested in the city by any act of the legislature that ever was passed. All the power that this city ever possessed to grant a franchise came, not from any provisions of the city charter, either the present or any previous one, but it came from the general laws of the state enacted by the legislature. It was contended in the court below by counsel for the appellees, that the city of Los Angeles, through its general supervisory powers over the streets and its general municipal powers under the charter of 1889, had the power to grant franchises for street railways or to refuse to grant them; to permit the streets to be thus occupied or refuse to permit it. But, as above stated, the claim was that this resulted impliedly from the power of the city over the streets. It is not denied that the charter of the city doesn't itself contain any provisions concerning street rail-

ways at all. No power is given the city by any express terms of the charter to make any such a grant; nor is that power contained in the charter at all unless it be through this general power over the streets, or some other equally general grant of power.

Prior to 1901 the legislature had passed some laws making provision for the disposition of franchises of this character in a somewhat similar manner to that prescribed in the statute of 1901, but these statutes were all of comparatively recent date. Prior to these particular statutes, all the power that existed anywhere except in the legislature itself, to grant street railway franchises was contained in the Civil Code of California which was originally adopted in 1872, and took effect for the most part on the 1st day of January in 1873. The provisions referred to were contained in sections 497-511 of the Civil Code, and were part of the chapter on corporations.

Now one of the reasons which, in the court below, was urged for the invalidity of the grant which is here in question, was that at one place in this franchise, it assumed to authorize two corporations to occupy the same street or track for more than five consecutive blocks. But the only reason why that fact, if it were true, would have any effect upon the franchise, is that the Civil Code, section 499, declares that two lines of street railway operated under different managements might be permitted to use the same street or track, each paying an equal portion for the construction of the tracks and appurtenances used by said railways jointly, but in no case must two lines of street rail-

way operated under different management, occupy or use the same street or tracks for a distance of more than five blocks consecutively. That section of the code was amended on February 25, 1891, two years after the adoption of our charter. To be sure, upon the face of this record as it appears here before this court, the ground upon which this contention was based does not appear, but was contained in the affidavits upon the injunction, and we only referred to it for the purpose of showing that the counsel for the appellees themselves are not fully persuaded of the correctness of their position with respect to the effect of the constitution acting upon a freeholders' charter, upon this particular statute, for, according to their argument, the freeholders' charter approved by the legislature, repeals all laws inconsistent with it, and so the Supreme Court of California has decided, and indeed the constitution practically says so. And more than that, the general laws with respect to municipal affairs are controlled by the charter so that if it were true that this particular franchise did contain any such authority for two lines of street railway operated under different management, to use the same street or track for more than five blocks consecutively, it would, if these general laws were repealed, be a matter entirely irrelevant, for, as already stated, this prohibition is contained in the Civil Code of California, and not in the charter of the city of Los Angeles, and the very argument assumes that the acts of the legislature providing for the disposition of street railway franchises were not repealed by the charter, nor

controlled by it. Take away section 499 of the Civil Code, and there is nothing in the laws of this state that put any limitation upon the right of different street railway corporations to occupy the same street or track for twenty-five consecutive miles if they saw fit.

But turning now more particularly to the provisions of the constitution and of the charter, it is submitted that when the constitution as amended on November 3, 1896, declared that all charters thereof framed or adopted by authority of this constitution, except in municipal affairs, should be subject to, and controlled by, general laws, it does manifestly appear that the words "except in municipal affairs" were used to express some idea in the mind of the legislature as to what municipal affairs are. In other words, the very manner in which the sentence is constructed shows conclusively that the constitution was not assuming to define what are, and what are not, municipal affairs. The constitution does contain a provision that any county, city, town, or township may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with general laws. (Constitution, Art. XI, Sec. 11.) But it nowhere says anything about the powers of municipal corporations created in this manner, nor anything about them at all except the general provision about the local police and sanitary regulations, and as to that, it will be observed the power of the constitution is not limited to cities with freeholders' charters, but they apply to all alike. Hence, with that exception (if it be an exception) the constitution says

nothing about what the powers of the city shall be, nor what this charter shall contain. And the city has only such powers as are conferred upon it by the sovereign, no matter how its charter may be framed.

Now it will be noted that the constitution does not define the expression "except in municipal affairs," nor give the least hint as to the meaning other than that which is conveyed by the words themselves. It is not to be believed that the constitution was either coining a new phrase, or using an old one in some sense peculiar to the constitution itself. It could not have been imagined by the makers of that instrument that the interpretation of those terms could be other than, or different from, the interpretations which had already been put upon such phrases, or that it related to anything else than those affairs which had been theretofore regarded as coming within the meaning of that term. The expression is used as though it were a phrase well known, and with a meaning fixed. It may be unfortunate that some pains were not taken to express more clearly just what was intended, for the phrase is one which is difficult of interpretations for reasons which have been given by the Supreme Court of California, whose particular function it is to construe this constitution.

In Fragley v. Phelan, 126 Cal. 383, Mr. Justice Garoutte, after stating the manner in which the question arose, said:

> "The solution of the questions thus presented largely revolves around the words 'except in municipal affairs' as these words are used in the constitution of the state. The phrase formed by

these words has a meaning, and a most significant one. This is apparent when we pause a moment to consider that this single phrase forms the subject matter of an amendment to the constitution of the state. The relationship existing between a state and its municipalities is so close that it may be said that every city ordinance and every state statute is a matter of interest to both state and municipality. It may be said that all state affairs are a matter of substantial interest to the municipality, and that likewise all municipal affairs are a matter of concern to the state. Yet those interests are incidental and indirect, and the meaning of this phrase necessarily takes a narrower scope. Indeed, in the very wording of the constitutional provision itself, we find that all matters of legislation pertaining to, and bearing upon, municipalities, do not come within the significance of the words 'municipal affairs' as used in the constitution. A mere glance at the provision demonstrates this fact. The constitution provides that cities and towns, 'except as to municipal affairs' shall be subject to, and controlled by, general laws. It is here plainly indicated that a vast amount of legislation pertaining to cities and towns does not come under the classification of 'municipal affairs.' "

There were several opinions by different judges in that case, and we invite attention to all of them. They are too long for quotation. And all taken together, doubtless do not furnish us with a very satisfactory explanation of the meaning of this term. But what we call particular attention to is that the court does assume that the legislature, when it proposed this amendment,

and the people in adopting it, had in their minds a something which was embraced within the designation of the phrase "municipal affairs," and that that term did not necessarily include all things which might be subjected to the power of the municipality. In some portions of the opinions in this case last cited, it would seem that some of the justices, or one at least, supposed that the meaning might be that whatever the municipality should, by its charter, be given the jurisdiction over, did, by that act, become a municipal affair. But such a construction cannot be allowed because that is to destroy the meaning of the constitutional provision. It was useless to declare that the charter should be subject to general laws 'except as to municipal affairs" if the very fact that the charter gave the power to the city at once made it a "municipal affair."

In the cases of the Board of Park Commissioners against Council of Detroit, 15 Am. Rep. 202; and People against Hurlburt, 24 Mich. 44, 9 Am. Rep. 103, Judge Cooley enters into a very elaborate discussion of the question of what may be said to be a purely municipal affair, and especially in the case first above cited. In that case it was held that the legislature could not compel the council to raise money to purchase a park contrary to their will, and, generally, that the legislature has not the power to compel the local authorities to levy taxes for a local improvement. Though the city may have the power to provide parks, open or lay out streets, yet whether it will exercise that power and in such a manner as to impose the burden thereof on its own citizens, is a question for its own

determination. And it will be found that in our constitution itself it is provided in section 12 of article 11, that the legislature shall have no power to impose taxes on counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof for county, city, town, *or other municipal purposes,* but may, by general laws, vest in the corporate authorities thereof, the power to assess and collect taxes for such purposes.

And in section 13, that the legislature shall not delegate to any special commission, private corporation, company, association, or individual, any power to make, control, appropriate, supervise or in any way interfere with any county, city, town or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments, or perform *any municipal functions whatever.*

And in section 14, no state office shall be continued or created in any county, city, etc., for the inspection, measurement, or graduation of any merchandise, manufacture, or commodity; but such county, city, town, or municipality may, when authorized by general laws, appoint such officers.

And other special provisions are contained with reference to the conduct of the affairs of municipalities, although doubtless some of the things there treated of would not come strictly within the definition of the term "municipal purposes" as distniguished from the general governmental purposes, and upon matters which affect and interest the people of all localities in a state as well as those who are the inhabitants of these

municipalities. But on the other hand, there are subjects which we see at a glance may be of vital importance in the management of the municipal affairs and property, but in which the general public would not only have no interest, but affecting affairs with which they have no concern. The prescription of fire limits, the regulation of buildings constructed within those limits, regulations for the prevention and extinguishment of fires, and various other matters with which municipalities have to deal, and which are of vital interest to the inhabitants of cities and towns, not only do not concern the rural districts, in many places sparsely populated, but the laws and regulations by which these affairs are governed, are themselves of no interest to other districts.

Now, while the legislature of the state of California in providing general laws for the organization of municipalities, and while the freeholders' charters adopted and approved under the provision of the constitution of California may confer upon the municipal authorities power over many subjects which are not those of peculiar municipal importance, but relate to affairs in which all of the people of the state are interested, yet nevertheless, as to such provisions, general laws passed by the legislature and manifestly intended to apply to them as well as to other districts, will govern and control the charters under the very terms of the constitution itself. And, further, the general principle that municipal corporations have no powers except those which are either expressly conferred or necessarily implied, or necessary to carrying out the powers which are conferred, is a principle as applicable to the free-

holders' charters as to any other. This principle of construction has been applied to this very charter of the city of Los Angeles.

In the case of the Los Angeles City Water Company against the city of Los Angeles, 88 Fed. 729-730, Judge Wellborn, in delivering the opinion in the case, said that these municipalities have only such powers as are granted by the charter, that is to say, such as were expressly granted or necessarily implied, or such as were necessary to the execution of the powers which were explicitly granted. And the charter which was there referred to by Judge Wellborn was this same charter of Los Angeles city, approved by the legislature in February, 1889.

The fact, therefore, that the constitution of this state has prescribed a somewhat peculiar and special mode for establishing charters of cities in this state, and the manner in which they are framed and adopted, and the fact that the authority therefore proceeds from the constitution of the state, does not modify the principle of construction which is here referred to.

All charters of municipalities emanate from the sovereign, and are subject to the same rules of construction, without regard to the manner in which they are framed or adopted.

Now, let it be remembered that the constitution provides that they are to be controlled by general laws except in municipal affairs.

Article XI, Sec. 6.

And when they are approved, they supersede any existing charter, and all amendments thereof, but

they do not supersede the general laws except in so far as they are inconsistent with the charter.

Now a franchise is a privilege emanating from the sovereign. They are not the property of municipalities. The granting of them must proceed either directly from the sovereign authority, or if by any inferior tribunal or political corporation, then the power to grant it must be given by the sovereign, and in this state must either proceed directly from the constitution itself, or where it has made no provision, then the legislature as the representative of the sovereignty of the state, must confer the authority.

A municipal corporation has not, by virtue of the general powers conferred upon it, any authority to grant a street railway franchise.

Mr. Dillon says: "In this section" (referring to section 724 of the 4th edition of Dillon's Municipal Corporations) "and the three following, the author sums up the conclusions to which he has arrived after an examination of all the reported cases upon the subject of railways in streets:

> "1. As respects ordinary railways operated by steam and street railways operated by horses, legislative authority is necessary to warrant them to be placed in the streets or highways. The legislature may delegate to municipal or local bodies the right to grant or refuse such authority. The usual powers of a general nature in municipal corporations over streets are not sufficient to confer upon them the right to authorize the appropriation of streets by ordinary railroads whose tracks are constructed in the usual man-

ner, and whose trains are propelled by steam. But it is otherwise as respects horse railways; and the ordinary powers of municipal corporations are usually ample enough in the *absence of express legislation on the subject* to authorize them to permit or refuse to permit the use of streets within their limits for such purposes. But they cannot, by an implied power, confer *corporate franchises or authorize the taking of tolls.* This must come from the legislature."

The italics are ours.

Now it is obvious that Mr. Dillon here does not go any farther than to say that under the general powers over the streets, the corporation has the power to permit or refuse to permit a street railway to be constructed. Even that authority comes from the legislature, but may be implied from the general authority of the municipality over the streets. But the power to grant a franchise to construct and operate a street railway and take tolls therefor is not implied from the general power of the city over the streets.

In the 4th subdivision of section 727, he says:

"As special legislative authority is necessary to enable a company to construct a passenger railway in the streets, the effect of such authority, when obtained and acted upon, is to give the company a property in the franchise and road, and hence no rival company has the right to use the track of the company which laid it down."

And he concluded the section by saying:

"The extent of municipal, police and other control over street railways depends, of course,

upon the municipal charter, and the legislation of the state touching the subject."

In State *ex rel* Attorney General against the Cincinnati Gas Light & Coke Company, 18 O. S. 262, it was said that the right to use the streets of a city for such a purpose, whether in the hands of a private corporation or a natural person, is a franchise and as such can only emanate directly or indirectly from the sovereign power of the state.

And this is upon the fact that such franchises as street railway franchises, franchises for laying pipes and supplying a city with gas or water, and various other things, are privileges emanating from the sovereign, and that it primarily belongs to the legislature to make such grants, that while the power may be conferred upon the municipality, yet nevertheless it is exercising the power of the state, and that when a grant is made by the municipality under such authority it is a grant of the state through the municipal authority as its agent.

City of Walla Walla v. Walla Walla Water Company, 172 U. S. 1; 43 L. Ed. 341.

Iron Mountain R. Co. of Memphis v. City of Memphis, 96 Fed. 113.

New Orleans Gas Light Co. v. Louisiana Light & Heat Producing & Mfg. Co., 115 U. S. 650; 29 L. Ed. 516.

Louisville Gas Co. v. Citizens Gas Light Co., 115 U. S. 683; 29 L. Ed. 510.

City Ry. Co. v. Citizens Street Ry. Co. (U. S.), 41 L. Ed. 1114.

In Mayor etc. of Knoxville v. Africa, 77 Fed. 501,

507, the circuit court of appeals for the sixth circuit, said:

> "Under the well settled law of Tennessee the power to grant to a public corporation a right of way for the operation of public railroads, commercial or street, on or over a particular street or public highway, resides primarily in the legislature of the state, but may be delegated to municipal governments."

Franchises, being sovereign prerogatives, belong to the political power of the state, and are primarily represented and granted by the state.

Fall v. County of Sutter, 21 Cal. 238.

Judge Cooley, in his work on Constitutional Limitations, in the sixth edition, at pages 231-232, said:

> "And the general disposition of the courts in this country has been to confine municipalities within the limits that a strict construction of the grants of powers in their charters will assign to them; thus applying substantially the same rule that is applied to charters of private corporations."

Here we are cited to note 1 at the bottom of page 232, wherein many cases are cited upon this subject, and among others Eichels v. Evansville Street Ry. Co., 78 Ind. 261, and wherein he says that it was held that the ordinary power of the city did not give it authority to grant a street railway franchise.

That case is also reported in 41 Am. Rep. 561-563. And in the case it is distinctly held that the authority to grant the right to lay tracks upon a public street of a city must be conferred expressly or by necessary

implication; that without such a grant the public streets could not be used by a railway corporation for the transportation of passengers for hire; that it was a franchise, and could only exist by the force of a legislative grant; and that they were called upon to decide, not whether the legislature could delegate the power to make such a grant, but whether such a power is embraced within the ordinary and incidental powers usually conferred upon, or possessed by, a municipal corporation; and they held that it was not, and moreover, it was distinctly said by the judge delivering the opinion that he was not speaking of the intersecting and crossing of streets by railway tracks laid down in building lines of road which run through the city, but of railways exclusively doing business in the city, and occupying the streets for that purpose.

See also Louisville & N. R. Co. v. Mobile etc., 4. Mun. Cor. Cases, 562, and the case cited in the note at page 571, Oakland R. R. Co. v. Oakland etc., 45 Cal. 365.

Harrison v. New O. & Pac. Ry. Co., 34 La. 462; 44 Am. Rep. 438-440.

And the note to Cooley, p. 232, where he cites the case of Williams v. Davidson, 43 Tex. 1, where it was held that the power to enact ordinances necessary for government does not authorize the grant of a franchise for a toll bridge.

See also Cooley's Constitutional Limitations, page 239.

In South Pasadena v. Terminal R. R. Co., 109 Cal. 322, it was held that the control of streets by a mu-

nicipality was only a qualified control, and subject to the termination of the authority by the state.

And the case of Philadelphia & Trenton R. R. Co., 36 Am. Dec. 202, 206-210, was cited as authority for that proposition, and in Beekman v. Third Ave. R. Co., 47 N. E. 277, 278-279, it was distinctly held that the authority to make use of the public streets of a city for railroad purposes primarily resides in the state, and is a part of the sovereign power, and the right or privilege of constructing railways on the streets, which, for convenience, is called a "franchise," must always proceed from that source, whatever may be the agencies through which it is conferred.

And in Fanning against Osborne, 102 N. Y. 441; 7 N. E. 307, it was held that the use or occupation for such purposes without the permission or grant of the state through the legislature, constitutes a nuisance which may be restrained by individuals injuriously affected thereby, and that the city authorities have no power to grant the right except in so far as they may be authorized by the legislature, and then only in the manner, and upon the conditions prescribed by the statute.

See further,

Davis v. Mayor *et al.*, 14 N. Y. 506;
Millhau v. Sharn, 27 N. Y. 611;
People v. Kerr, *id.* 188.

Now, as we have already stated, the charter of the city of Los Angeles does not, anywhere, expressly confer any power to grant such a franchise, and the

provisions of the charter from which such a power, it is claimed, may be implied, are the following:

Article I, Sec. 2, declares that

"The said corporation shall have the power:

* * *

"8. To lay out, open, extend, widen, improve or vacate, pave, and repave streets and alleys, sidewalks and crossings, and other highways.

* * *

"12. To manage, control, sell, lease, or otherwise dispose of any or all the property of the said corporation; and to appropriate the income or proceeds thereof to the use of the corporation; provided, that it shall have no power to mortgage or hypothecate its property for any purpose.

* * *

"22 To make and enforce within its limits such other local, police, sanitary, and other regulations as are not in conflict with general laws, and are deemed expedient to maintain the public peace, protect property, promote the public morals, and to preserve the health of its inhabitants.

"23. To exercise all municipal powers necessary to the complete and efficient management and control of the municipal property, and for the efficient administration of the municipal government, whether such powers be expressly enumerated herein or not, except such powers as are forbidden or are controlled by general law."

Stats. of 1889, pp. 456-458.

The provisions of the charter as to the manner of granting franchises, we have already referred to and quoted.

And from these general governmental powers it is claimed that the power to make such a grant may be implied. Such an implication, we submit, is far fetched, and even if it could be indulged at all, the rules of construction to which we have already several times referred, would exclude any such interpretation in this case.

In People v. San Joaquin Ry. Co., 111 Cal. 544, where the act of 1893 providing for the disposition of just such franchises was under consideration, the court, after saying that it could not be denied that the language of the act was broad enough to include the franchise that petitioner sought, said:

> "But a statute will not always be held to include every case which falls within its literal terms; the penalty of death denounced against any person who draws blood in the street is not incurred by a surgeon who bleeds one who has fallen in a fit, and so generally, no law will be so applied as to work a palpable absurdity. The word 'railroad' is certainly broad enough to cover a steam railroad, and the privilege of laying and operating a steam railroad through a city is clearly included in 'any privilege whatever,' but, at the same time, if it is perfectly evident from the whole tenor of this act, and other acts in *pari materia*, that the legislature could not have intended the consequences of a literal construction of the language above quoted, such a construction cannot obtain."

In Laidlaw v. Pacific Bank, 137 Cal. 392, the supreme court held that it was the duty of courts to interpret statutes according to their true intent and

meaning deduced from the whole and every part thereof, taken together, and that the intent so ascertained must prevail over the literal sense of the terms, and control the strict letter of the law when the latter would lead to palpable absurdities.

To the same effect is *Ex parte* Ellis, 11 Cal. 223, 224.

Giving a common sense construction to these provisions of the charter, and indeed to any contained in it from which such an implication could, by any possibility, be supposed to arise, and looking at the previous legislation of the state and the decisions of the courts upon acts of the character now under question, it is obvious that the charter was never intended to confer any such power. As we have already said, the power that the city of Los Angeles or any other city in the state of California ever exercised in the granting of street railway franchises, never came from their charters or any of them; they were always conferred by general laws of the state of California, and did not proceed from charters. Many times the legislature of the state of California has acted directly in making the grant. A number of such legislative acts may be found in the statutes of 1861.

Statutes of 1861, pp. 144, 146, 187, 190, 193, 264, 382, 656.

When the codes were adopted in 1872, and put in effect, the 1st of January, 1873, the general powers upon this subject were contained within the Civil Code, and at the sections to which we have already referred, and this continued to be the authority, and the only

authority which any municipal corporation in the state possessed to make a grant of these franchises until 1893. By the provisions of the Civil Code they were not offered for sale, and the governing body had discretion in making the grant or witholding it.

But in 1893 the legislature passed the first act authorizing the disposition of these franchises in a different manner, and that was a general law applicable to all parts of the state.

Stats. of 1893, p. 288.

This act underwent several changes until there came the act of 1901, under which this controversy arises, and no city in the state has ever assumed to grant a street railroad franchise except in pursuance of these various acts.

In Arcata v. Arcata etc. R. Co., 92 Cal. 639, 644-645, the supreme court of California held that there was no question as to the right of the legislature to delegate to municipal boards the power and discretion to say whether a railroad shall be laid in the streets, and if so, where and under what conditions, and that authority was conferred in the Civil Code, sections 465 and 470. That to be sure was the case of a commercial railway, but the franchises are of exactly the same nature.

Now this case was decided long after the charter of the city of Los Angeles went into effect, and long after the new constitution had taken effect.

In People v. Rich, 54 Cal. 74, it was held that the mayor and common council had no authority to pass an ordinance granting to the defendants the right to

law a street railway track in violation of section 499 of the Civil Code; that is, that a franchise could not be granted for two corporations to occupy the same street or track for more than five blocks.

The same thing was decided in Omnibus R. R. Co. v. Baldwin, 57 Cal. 160.

And that case was decided after the adoption of the new constitution, and the ordinance which was there in question was passed by the board of supervisors of the city of San Francisco.

In Pacific Ry. Co. v. Wade, 91 Cal. 449, the rights acquired by the Pacific Railway Company by the grant of a franchise by the city of Los Angeles, were measured by the provisions of the Civil Code, although this case was decided after the charter of 1889 had been adopted.

The question there was as to the right of the Pacific Railway Company to go on the same track with another, and the mode of ascertaining the compensation to be paid as provided in section 499 of the Civil Code. [See the opinion, p. 452.]

We quote from this opinion the following:

> "None of the elements of an ordinary condemnation proceeding is involved in the litigation; there is no private property to be taken for public use, no occasion to exercise the right of eminent domain. The cable company did not acquire by the grant of its franchise any proprietary interest in the street. There can be no private property in a street, except the fee of the owner, which is held subject to the easement as long as the public continue to use the street as a highway. The maintenance of horse railroads

and running of cars upon the public streets of the city of San Francisco, designed for the carriage of passengers, is a mere special mode of using the highway, nothing more. * * * The franchise of the cable company gave it no exclusive use of that portion of the street upon which its road was constructed. It gave to the company the right to construct its road in such a place and manner as not to interfere with the use of the street by the public."

Id 453.

There is much more to the same effect, and on page 454 they refer to this section 499 of the Civil Code as prescribing one of the conditions upon which the grant was made to it in the first place.

In People v. Los Angeles Electric Railway Co., 91 Cal. 338, the action was brought to have it determined that the defendant had forfeited its rights, privileges and right of way and franchises acquired by it under a municipal ordinance passed by the city of Los Angeles on the 28th day of January, 1886. The judgment of the court below was against the Electric Railway Company, and the appeal was taken to the supreme court. After the appeal was taken, the legislature had passed two acts, by one of which section 497 of the Civil Code was so amended as to invest municipal corporations with the power to grant a right to propel cars by electricity through streets and highways. By the other, ordinances passed prior to the passage of said act giving authority and permission to propel cars by electricity, were confirmed and ratified, and made valid.

The court held that this ratifying act was consti-

tutional, and that if there was any lack of power in the first instance, the state had, by that act, waived its right to enforce a forfeiture of the defendant's franchise on that ground.

It was further decided that the board of supervisors could not grant a franchise or right of way in any other way than according to the provisions of section 502 of the Civil Code.

The judgment was reversed, and it will be seen by the entire opinion that it was to the general laws upon this subject, namely, the provisions of the Civil Code and the act ratifying and confirming previous ordinances of the city, that the case was decided. The present charter of the city of Los Angeles was in full operation at the time of the decision, but it was never hinted that we were to look to the charter either for the power to construct a railway and operate it, or to affect the rights of the grantee in any way.

In People v. Sutter Street Ry. Co., 117 Cal. 604, on an information filed by the attorney general to have it declared that defendant usurped and unlawfully exercised the franchise of a street railway, and maintain in and upon Bush street, etc., switches, etc., the court said:

> "It is shown that defendant has abandoned no portion of its line. The supervisors had no power to extend the time within which the track must be completed. That is fixed by the statute, section 502 of the Civil Code, and a different period cannot be fixed in the grant of the franchise. The provision in the franchise that the time shall not commence to run, if valid, might have the effect

to extend the franchise for more than fifty years, contrary to section 497 of the Civil Code. No valid franchise can be granted by the supervisors which conflicts with the general statutes."

117 Cal. 611.

Again:

"I am unable to discover any act on the part of the city by which a forfeiture was waived, if it were conceded that a forfeiture could be waived by the city. No right is acquired by maintaining an obstruction in the street. Statutes of limitation do not run in favor of such a trespasser. If the law be, as is claimed by some, that such a franchise is not lost until it has been declared forfeited in a judicial proceeding, the city could but acquiesce. It has no power to institute an action to secure a forfeiture. That power is vested in the attorney general. As it could not enforce a forfeiture it could not waive it. The city cannot be estopped in respect to a matter over which it has no power. There is no statute which requires the municipal authorities to request the institution of such a suit, or which gives any force to such a request should it be made."

117 Cal. 612.

Now from the opinion in this case it is very clearly shown that the whole power of the city and county of San Francisco in such matter comes from general laws, not from its charter, and that the governmental control of the franchises is in the state, not in the city.

In Eisenhuth v. Ackerson, 105 Cal. 87, a case which, upon another point, is greatly relied upon by the defendants in this case, it was shown that the power of the city of San Francisco at least to grant

street railway franchises, came from the Civil Code, not from its charter, that is to say, that the franchise which was there under consideration and the grant which was there made, came from the Civil Code, and they held directly in that case that for the purpose and to the full extent of authorizing such governing bodies to grant street railway franchises, section 497 of the Civil Code is a general law, and by implication repeals all prior laws inconsistent therewith, and they held that it was not inconsistent with section 68 of the consolidation act which provided for the approval of the president of the board before it took effect. And they said that the Civil Code did not say anything about how such grants should be made, and therefore it was not inconsistent with that provision, and that the approval was necessary in that case.

To avoid referring to this case again we submit that the provisions of the Civil Code and those of this act of 1901 in relation to the grant of these franchises, are altogether different. The Civil Code did not offer them for sale, and did not direct that the governing body or anybody else should strike off, sell, and grant, to the highest bidder, but the powers which were there exercised were discretionary. The code didn't compel them to grant a franchise, but gave them the power to do so, and the municipality had the power, under the Civil Code to determine for itself whether it would legislate on the subject at all, and upon what conditions it would make such a grant, subject only to the limitations which the general law itself had imposed with regard to those conditions. The neces-

sity for the construction, therefore, did not exist under the Civil Code so far as the veto power of the president was concerned, any more than it existed when the city of Los Angeles acted upon these same powers which were conferred by the Civil Code. In each case there was a discretion to be exercised. Under the present act there is none at all.

But returning to the other question. In People v. Craycroft, 111 Cal. 544, it was held that the act of March 23, 1893, requiring the sale of railroad franchises in the streets of cities to the highest bidder, must be construed as applying only to cases of street railroads where *bona fide* competition is possible, and they gave the reason therefor, but manifestly held it to be a general law which superseded, so far as the subject to which it applied, the provisions of the Civil Code.

In Thompson v. Supervisors of Alameda Co., 111 Cal. 553, the act of March 23, 1893, providing for the sale of franchises, was directly held to control the entire proceeding, and when it said that said sale should be to the highest bidder, without stating other terms or conditions of sale, it meant cash, and that any bid for anything else than cash could not be received as a legal bid or any tender under the act.

Decisions of the supreme court of California leading to the same conclusions which we are about to deduce from these cases decided by the court, and the acts of the legislature referred to might be multiplied almost *ad infinitum*.

Now, what we claim results from them is this: That

in nearly all the charters of all the cities or towns that have ever been organized, or created, or incorporated, under the laws of the state of California, these very general powers to which we have referred over the streets of the city and the exercise of powers necessary to an efficient government, have almost invariably been given in their charters or in the general laws under which they were organized. Notwithstanding this fact, the legislature has continually been exercising the power, of itself making grants of street railway franchises in those towns and cities or by general laws conferring the powers upon other agencies, usually some municipal board, tribunal or officer, and these general laws have been before the courts in many cases, both before the constitution of 1879 was adopted providing for the freeholders' charters, and since that time, and before the charter of the city of Los Angeles, or the freeholders' charter of the city and county of San Francisco, and since the adoption of those charters, and there never has been a case in which the court has ever looked to anything else except the general laws as the authority to make such a grant, or ever denied or questioned the application of those general laws, and their control over all these municipal bodies.

In the Eisenhuth case, as we said before, they held that the provisions of the Civil Code authorizing the grant of these franchises did not conflict with the provisions of the charter of the city and county of San Francisco prescribing the mode in making the grant. It was manifestly implied that if the Civil

Code had conflicted with the charter, it would have controlled it.

But we say that all of these decisions of the courts and of the legislature have implied, and frequently directly determined, that there was no such conflict. But by the very terms of the constitution relied upon by our adversaries, the charter of the city of Los Angeles did not repeal or supersede the general laws not in conflict with it. And by the other provision, the charter is itself controlled by general laws except as to municipal affairs, and this granting of a franchise to construct and operate a street railway is not a municipal affair, and the provisions of the charter are not in conflict with those general laws, and hence we are to look to the general act of the legislature both for the authority to make the grant, and for the manner in which it is to be made.

If the construction which we here contend for is true, and if the general law is in conflict with the charter, because the charter says that an ordinance shall be necessary to the grant of a franchise, and that that ordinance must be approved by the mayor or passed over his veto, or become operative by his failure to return it within ten days, then the general law prevails. Furthermore, in construing statutes, they are to be construed as a whole, and each part permitted to shed its own light upon every other part.

And in looking into acts upon the subject under discussion, we are to arrive at a construction which will harmonize them all if such construction be reasonable.

We see plainly that the whole scope and purpose,

as well as the language, of the act of 1901, is absolutely incompatible with a mode of disposition which necessarily implies discretion, where none was given nor even permitted, and a discretion which may, as in this case it did, operate to prevent the doing of that which the legislature in peremptory terms commanded should be done. Hence it must fall to the ground, so far as the city of Los Angeles is concerned, if the charter mode of granting franchises is exclusive of every other mode in every case of disposition of franchise. Yet nevertheless, those general laws of 1893 and 1901 were operative to supersede the provisions of the Civil Code in so far as they were in conflict, and that has been expressly declared by the supreme court of this state. Therefore, if the act of 1901 can't operate in the city of Los Angeles, but does operate to repeal the provisions of the Civil Code, then there is no power to grant a street railway franchise in the city of Los Angeles at all, for we have already shown that the general municipal control referred to does not give the power to grant a street railway franchise, and the existence or non-existence of some other general law or express power given elsewhere to grant such a franchise does not affect the interpretation to be given to the charter of the city of Los Angeles. Charters which did not give such power expressly, but which did give these general powers, have been interpreted by other courts, and it is the settled doctrine that the power to grant a street railway franchise does not exist, and will not be implied from any such general provisions. But

now such results do not necessarily follow from the charter, and these general laws. When the charter of the city of Los Angeles said that in order to grant a franchise an ordinance was necessary to be approved by the mayor, the natural construction of it would be that the granting of franchises here mentioned and referred to, was the grant of such franchises as by the charter the city was authorized to grant. In other words, this is the mode of exercising its charter powers.

Now under the charter, the city has the power to grant many different franchises. It has the power to provide for supplying the city and its inhabitants with water and gas or either, or other means of heat and illumination.

Article I of the charter, Sec. 2, sub. 7, Stats. of 1889, p. 457.

It has the power, by ordinance, to regulate and provide for the lighting of streets, laying down gas pipes and erection of lamp posts, electric towers, and other apparatus, and to regulate the sale and use of gas and electric light, and fix and determine the price of gas and electric light, and the rent of gas meters within the city, and regulate the inspection thereof; and to regulate telephone service and the use of telephones within the city, and to fix and determine the charges for telephones and telephone service and connections; and to prohibit or regulate the erection of poles for telegraph, telephone, or electric wire in the public grounds, streets, or alleys, and the placing of wire thereon."

Art III, Sec. 31, Stats. of 1889, p. 464.

It has the power by ordinance to provide for maintaining a fire alarm and police telegraph system.

Id. Sec. 33.

Many other provisions of the charter are such as would necessarily include the power to grant franchises because necessary to the exercise of those powers which are granted.

When the power is given by the charter to grant franchises, and the same charter prescribes the mode in which the grant shall be made, the fair construction is that the mode has reference to the granting of those franchises which lie within the charter powers, and any other construction—an interpretation that this mode must be applied in the granting of all franchises, no matter from what source the power may proceed, nor what the direction which that source has given in reference to it—would have to be imposed upon the charter by every necessary implication through its context, or it would not be allowed at all. In this case there is no such necessity.

The counsel for the appellees in their argument in the court below seemed to be impressed with the notion that these charter powers given to the municipality over the streets of the city, created in the city itself a sort of title to the streets; that, by virtue of those provisions, it becomes the owner of the streets, and entitled to the possession of them, and that therefore the granting of rights of the character here treated of was the creation of interests in the property of the city itself, and must necessarily proceed from the city, or if not necessarily, at least this sort of pro-

prietary interest of the city would carry with it the power to create easements of this kind in them without any express grant of such power in the charter. But the city's power over the streets of Los Angeles are no greater under the freeholders' charter than they have been for the last thirty-five years and more. In the charter of 1865 and 6, and of 1878, the powers given to the city with respect to the laying out and opening, and altering, and extending, and improving, streets was quite as great as under the charter of 1889, and while the city has undoubtedly a large power over the streets, that does not create any such proprietary rights in the streets on the part of the city as is contended for by counsel, at least, such is not the view which the supreme court of California has taken of the powers of the state over the streets, nor the nature and character of the city's jurisdiction over them under any of the charters of any of the cities of the state, or any of the general laws providing for the incorporation of municipal corporations that have ever been passed by the state. It has been repeatedly decided that the state has the sovereign control of the streets of the city, just the same as any other public highways.

Thomason v. Ruggles, 69 Cal. 465, 472;

Polack v. Trustees of San Francisco Orphan Asylum, 48 Cal. 490;

San Francisco v. Spring Valley Water Works, 48 Cal. 493, 529;

Brook v. Horton, 68 Cal. 554, 558;

San Francisco v. Burr, 108 Cal. 460;

Town of Arcata v. Arcata & Mad River R. R. Co., 92 Cal. 639;
Blood v. McCarty, 112 Cal. 561;
Blood v. Woods, 95 Cal. 78, 86.

These cases deal with the subject in almost every way, declaring that the legislature possesses complete power to vacate a street in a city, and may commit that power to the municipal authorities, and after it has been committed, may withdraw it. That all public streets, alleys, and roads of the state are public highways for the people of the state, and the state has an original right to control it. That this doctrine applies equally to streets and alleys of a city or village as to country roads; that the municipality has no control over them unless the right of control has been vested by the state, and when it is so vested, the municipality acts as the agent of the state.

And it has been further held that the street, when dedicated, becomes the property of the whole state, which the legislature can dispose of it at pleasure.

San Francisco v. Burr, 108 Cal. 460.

Such is the doctrine, too, of other states, and so far as we know, of all of them. Among the cases which may be cited are:

People v. Kerr, 27 N. Y. 188;
Barhite v. Home Telegraph Co., 63 N. Y. Sup. 659;
O'Connor v. Pittsburg, 19 Pa. St. 187;
Mercantile Trust Co. v. Collins Park & B. R. Co., 99 Fed. 812;

People v. Suburban R. R. Co., 53 N. W. 349; Florida Cent. & P. R. Co. v. Ocala, etc., R. Co., 22 So. Rep. 692.

The case of Byrne v. Drain, 127 Cal. 663, is not at all in conflict with the doctrine that when the street is opened and becomes a public highway for the people of the state, it is under state control. The question which was in controversy there, was as to the validity of a local assessment for the improvement of the street, and it was held that that was a municipal affair, and that the charter powers of the city prevailed over the general so-called Vrooman act. But this again is in accordance with the principles maintained by Justice Cooley in the cases already referred to, namely, that the imposition of local assessments or local taxation upon the people and property of the city must be made by the municipal authorities. Besides, the constitution of California, as we have already said, does directly declare that the legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.

Constitution, Art. XI, sec. 12.

And the case last referred to determines no more than that the legislature, though it may vest the municipality with the control, in whole or in part, of public streets, or give it jurisdiction over other sub-

jects, cannot impose taxes upon the local political community against its will.

Another constitutional objection made to this act by our opponents is founded upon section 13 of Article XI of the constitution, which declares that the legislature shall not delegate to any special commission, private corporation, company, association or individual, any power to make, control, appropriate, supervise, or in any way interfere with any county, city, town, or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments, or to perform any municipal functions whatever.

But, as with many other arguments made by counsel, their construction of the act of 1901, and of the character of the franchises there treated of, must first be adopted before section 13 can have anything at all to do with the proposition. We have endeavored to show that the granting of a franchise to operate a street railway in a city is not a municipal improvement, certainly isn't city money, property or effects, and does not provide for the levying of taxes or assessments, nor the performing of any municipal functions whatever. On the contrary, franchises, as we have repeated doubtless too often, are sovereign prerogatives or privileges emanating from the sovereign, and the keeping of that fact in view will avoid many misunderstandings into which our opponents have fallen, and among them this supposed power of the mayor to veto the grant of a franchise under that act. When it is remembered that the things which

were dealt with in that act are rights and privileges residing in the sovereign, and granted by it, and by it alone, either directly or through such agents as it saw fit to adopt, it will be seen that in this instance the governing body was the agency selected by the legislature for the purpose of granting the franchises therein provided for, and that in acting upon this matter the council occupies no different position from that which would have been occupied by any other agent that the state saw fit to employ for the exercise of this function, or carrying its will into effect. If it had selected the city treasurer, the sheriff of the county, the chief of police, or any other public officer or tribunal, his position would have been exactly the same. He would have been the mere agent of the state clothed with powers prescribed by the act of the legislature, and none others, at least so far as this particular matter is concerned.

Instances of the exercise of the powers of the state through any agents which it sees fit to employ exist without number. It is said, however, with respect to this particular matter, that the granting of a franchise is a legislative act, and therefore that the council acted in a legislative capacity in making that grant. That legislative action is necessary to a grant of a franchise is admitted, but the legislative action in this case is found in the statutes of 1901. It by no means follows that the grant itself of a franchise need be a legislative act, or is, in its nature, a legislative act, any more than the granting of any other right, privilege or property whatever. When the legislature acts

directly in making the grant, it may be said, in some sense, to be a legislative act. But even then, the two things, the authority to make the grant, and the grant itself, are totally different acts. Legislative authority is absolutely essential to the disposition of the public lands of the state of California, as also of the public lands of the United States. But the act of issuing a patent, that is, of transferring the title, is not legislative. The legislature of California has passed laws for the disposition of the public lands of the state just as the Congress of the United States has, for the disposition of the public lands of the United States, and in this state the administration of those laws is committed to the land department, consisting of the surveyor-general, who is also *ex officio* the register of the land office of the state, and in the United States the power is vested in the Interior Department. And in the departments of both governments, a sort of quasi legislative power is vested to the extent of adopting rules and regulations prescribing the mode of proceeding in the administration of those laws.

Now, because the council happens to be a legislative body, as well as being clothed with some powers of a totally different nature, it does not follow that all its acts are legislative. And the powers which the council performed in this particular instance are exactly the same character as they would be if performed by some other agent selected by the state. And whenever Congress or the state legislature makes a grant directly to an individual or public corporation,

of the public lands of the state or of the United States, they have exercised both the legislative and the executive power in that act. They have determined, by it, the intention of the United States to dispose of it and determined the objects and purposes and considerations upon which, in its judgment, they should be disposed of. They have dispensed with the procedure ordinarily obtaining, but which originally came from themselves, and they have at the same time executed the grant which it has legislatively determined should be made. Keeping this in mind, it is not very much out of the way to say that the granting of a franchise is a legislative act. But that legislative act may consist of a single declaration of the will of the legislature, or it may be by the passage of laws authorizing the disposition prescribing the terms, appointing the agencies, and determining the powers of that agent in making such disposition. These purely legislative acts, coupled with the grant itself, make the grant of the franchise as much so as the power of attorney of the principal, and the exercise of the power by the agent, constitute the execution of the conveyance of property.

The legislature of the state of California passed an act creating a board of tide land commissioners for the disposition of the tide lands of the state. But it did not invest those commissioners with the power to legislate upon the subject as to whether they should be disposed of at all, or the terms or conditions upon which the disposition should be made, but it passed an act providing for the disposition of the tide lands,

and created this board as the agent of the state making the disposition thus provided for, and the grant itself and the exercise of those powers by that commission were not legislative acts.

Stat. 1867-68, p. 716.

We have been cited to the fact that the price paid for franchises goes into the city treasury, and is used for municipal purposes, and from this the conclusion is drawn that that of itself makes it a municipal purpose, or, to express the same thing more definitely, is a recognition of the fact that it is a municipal purpose; for, say counsel, if that were not so, and if the streets and the control over them were the property of the state, then the payment of the purchase price to the city would be in violation of section 31, Article IV, of the constitution of California, which declares that the legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the state, or of any county, city and county, city, township, or other political corporation or subdivision, of the state, now existing or that may hereafter be established, in aid of, or to, any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof in any manner whatever for the payment of the liabilities of any individual, association, municipal or other corporation whatever, nor shall it have power *to make any gift, or authorize the making of any gift of any public money* or thing of value, to any individual, municipal or other corporation whatever, and that the direction for the sales of these franchises and the purchase price to be paid to

the city, makes a case of a gift to the municipal corporation of the public moneys. There are two mistakes, however, in this proposition:

A franchise is not the property of the state in any proper sense of that term. It is a sovereign power, a prerogative. The granting of it confers property rights to the grantee, and the franchise is undoubtedly real property. Again, the streets are not the property of the state nor of the city, and therefore it is not a case of the state's donating property or money to anybody, the municipal corporation or anybody else. The privilege of exercising the franchise is bestowed by the state in its sovereign capacity, directly or through some agency appointed by itself, and the consideration is usually the public convenience and the public welfare. Prior to the year 1893 these franchises were never sold. The state granted them frequently directly, as already shown, and general laws were passed at an early period under which these franchises were granted under the authority of the state by the municipalities, but never for any other consideration than the public welfare and to promote the public interests. Now, when the franchises were thus disposed of, was the state giving away these franchises within the sense of the constitutional provision when it acted directly in making such grants? Has the city of Los Angeles been donating the city property to a private corporation when it has been making these grants under the provisions of the Civil Code, ever since the adoption of this constitution of 1879, and prior to 1893, of the street railroad franchises that have been granted since the adoption of the constitu-

tion of 1879 whether under the Civil Code or under these various acts providing for sale of the franchises? Such would be the case if the claim made here is correct. But nobody contends for any such thing. It is not claimed that the granting of these franchises without price was in violation of the constitution. But if the state could grant or authorize others to grant these franchises without any pecuniary consideration moving to itself or anybody else, what objection is there to an act which provides for the disposition of these franchises for a pecuniary consideration to be paid to the city? If they could grant it without any pecuniary consideration at all, we can see no objections to providing that such pecuniary considerations as shall afterwards be demanded should be paid to the city. The fact of such payment did not make it a municipal affair.

See:

State of Maryland v. Baltimore & Ohio R. R. Co., 3 How. 535; 11 L. Ed. 714, 720.

The Board of Education of the city of Los Angeles, as well as other cities, are usually called municipal officers, and the council levies taxes for school purposes, and the money is raised by them and apportioned to the city for its use for these purposes, but that does not change the fact that the educational department, including that department in municipal corporations, is a state institution.

See opinion of Myrick, Judge, in Earle v. San Francisco Board of Education, 55 Cal. 489, 495.

And see I Dillon Mun. Corporations, 3rd ed. sec. 58.

But again returning to the mode of exercising the power. It is obvious from the reading of this statute that no ordinance was required to make this grant at all, and any form that the council saw fit to adopt to express the final result was sufficient. And the mere fact that the form of an ordinance was adopted as the means of declaring that result, did not necessitate the approval by the mayor, nor change the character of the act in any respect. The mayor's approval is not necessary for many acts which the council do.

In Truman v. Board of Supervisors, 110 Cal. 128, it was held that the mayor's approval was not necessary to a tax levy, yet a tax levy is just as much a legislative act, and far more, than the grant of a franchise so far as concerns the mere act of vesting the right to the franchise in the person to whom it is granted.

There are many cases holding that the veto power is not only not implied, but must be expressly given, or fairly to be inferred.

Jacobs v. Board of Supervisors, 100 Cal. 121;
Volk v. New York, 47 N. J. L. 117;
State v. Ames, 31 Minn. 440;
City of Burlington v. Dennison, 42 N. J. L. 165;
Erwin v. City of Jersey City, 37 A. 732;
State v. Common Council, 55 N. W. 118.

Furthermore, if there is no discretion left in the council to finally strike off this franchise to the high-

est bidder, even if it were conceded that the statute contemplated the mere form of the mayor's signature, yet being a mere form the neglect to approve is a mere informality.

In State v. Ramsey County, 32 Minn. 181, it was held that when a particular officer has no discretion as to affixing his signature to a contract, the neglect to do so is an informality, merely, and will not vitiate the contract. And the same was held in Solena v. Newby, 48 Am. St. Rep. 653.

And besides all this, even if it were conceded that the provisions of the charter had any effect at all, and an ordinance were required, and which ordinance was to be approved by the mayor, yet nevertheless it is perfectly manifest that under the provisions of this statute the duty of carrying this contract into effect was imposed upon the city when the purchase price was paid by the appellant and the bond given as required by the statute. When this was done, the purchaser had done all that the statute required of him, and if anything were lacking to complete the legal title, yet still the equitable title was vested. This has been so held with respect to the sale of public lands in innumerable cases.

Wirth v. Branson, 98 U. S. 118; 25 L. Ed. 86;
Hutchings v. Low, 15 Wall. 77; 21 L. Ed. 82;
Frisbie v. Whitney, 9 Wall. 187; 19 L. Ed. 668.

And it is now well settled that the purchaser of real property is the equitable owner, and though the vendor still holds the legal title, he holds it only as

a trustee, and the vendee acquires an equitable ownership of the purchase property.

I Pomeroy's Equity Jurisprudence, sec. 105, sec. 368.

And this doctrine declared by Mr. Pomeroy in the sections referred to was applied by the circuit court of appeals for the fifth circuit, in Warner v. City of New Orleans, 87 Fed. 829, 834.

The rights which were thus vested in the appellant here, even though equitable merely, could no more be divested than legal rights. The contract thus made can no more be impaired, even if it could be conceded to be still executory, than could the contract made by the final act, the grant itself, be impaired.

In Safety Insulated Wire & Cable Co. v. Mayor etc. of Baltimore, 66 Fed. 140, 144, Judge Simonton, delivering the judgment of the circuit court of appeals of the fourth circuit, said:

> "There is another point of view. In its governmental or legislative capacity a municipal corporation is invested with discretionary powers. It has a discretion as to the time and manner of making corporate improvements, grading streets, making sewers, drains, vaults, etc. The courts cannot control this discretion. But when this discretion has been exercised, and the public improvements determined upon, and a contract made relative thereto, the legislative function has been exhausted, and the duty has become purely ministerial. [Dill. Mun. Corp. sec. 949; Weightman v. Washington, 1 Black, 49.] But, apart from and above all this, the obligation of a contract made between parties competent to contract

cannot be impaired at the option of one of the contracting parties. This doctrine controls whether the party to the contract be a sovereign state or an humble individual. It has been enforced against the action of states when the subject matter of the contract was the exercise of the highest governmental and legislative powers—the granting of a franchise. It has perpetuated an exemption from the power of taxation when such exemption has been the consideration for the contract between the sovereign and the citizen. And municipal corporations, mere creatures and agents of the sovereign, are not exempted from the operation of the rule. 'Upon authorized contracts within the scope of the charter powers of the corporation, and duly made by the proper officers and agents, they are liable in the same manner and to the same extent as private corporations.' "

66 Fed. 144.

In that case an ordinance was passed to place the wires of the police and fire alarm telegraph, and police patrol, systems under ground, and appropriated for the work $100,000 of the $250,000 set apart for laying conduits for underground wires. The board of fire commissioners and superintendent of police and fire alarm and telegraph, acting under this ordinance, advertised for bidders to do this work. The complainant put in a bid for $97,985, and it was accepted on the 28th of June, 1893. On the 30th the company declared its readiness to begin and conclude the work, but was informed on the same day that the vote awarding the contract was reconsidered because the ordinance was, as they were advised by the city so-

licitor, defective and void for indefiniteness. And the court held that the contract was made, and the city had no power to rescind it.

The present case certainly is no weaker, but, we think, very much stronger than the one just cited. Not only did the appellant in this case make the highest bid, but that bid was accepted, and the whole purchase price paid by appellant and accepted by the council or other governing body, and the money was paid to the treasurer under its direction. And the last act, the bond, was given and accepted and approved by the council, and filed in the archives of the city. And if any formal ordinance, approved by the mayor, was necessary to perfect the legal title to the franchise therein granted, here was a contract, and one which, under the terms of the law, left no discretion in the municipal authorities, whoever they may be, as to the making of the grant. And equity will consider that as done which ought to be done, and this for all collateral purposes, and that title, though it be equitable only, is entitled to the same protection from the federal constitution as any other title, no matter how absolute nor with what formality of legal instruments it be surrounded.

While our charter prescribes the title an ordinance must bear, the prescription is merely directory, and the action of the council will not be void for the omission of the title, or a defective title.

1 Dillon Sec. 310, Note 1.

St. Louis v. Foster, 52 Mo. 513.

Creighton v. Mansen, 27 Cal. 613, 628-629.

City of Napa v. Easterly, 76 Cal. 222, 227.

In the argument of this case in the court below, it was seemingly urged in all seriousness that the progress of civilization, the increase in property, and the rapid increase of material wealth in this city of Los Angeles, made it highly probable that the city might do better with this franchise at some other time or in some other way, that but for the conflict that was raised before the council, it might have produced more, even at the time it was sold, and this appeared to have furnished some reason in the minds of our adversaries why the court should not grant a decree which, as it was claimed, operated as a sort of a decree for specific performance, because of this possibility of its bringing a much greater price.

Contracts cannot be avoided because one of the parties may come to the conclusion that he could do better. When the constitution declares that the obligations of contracts cannot be impaired nor property divested without due process of law, it did not insert as a condition to the protection of that constitution, that the parties to that contract should be entirely satisfied with it. Such a limitation would eliminate the constitution, since it would seldom, if ever, happen that the provisions of the constitution would be invoked unless some party had become dissatisfied. A court will not set aside a contract by a municipal corporation for the purchase of property which has been delivered to it, upon the ground that it made a bad bargain, and paid more than the property was worth,

and that the action of the common council was dictated by improper motives.

City of New Orleans v. Warner, 175 U. S. 120, 121; 44 L. Ed. 98.

It was objected at the hearing below that there was more than one franchise sold for one bid in this case, and that, for some reason or other, this is not allowable under the statute.

The case mainly relied upon for that proposition was Beekman v. Third Ave. R. Co., 47 N. E. 277, 279-281. We have already referred to the fact that the objection was made in the demurrer of the city and others to the bill, that it was uncertain in that it didn't appear whether there were one or more franchises sold. To the objection thus raised, we have already made reply, but in the argument upon the whole case in the court below, it appeared that the real ground of objection was that at one or two places in this franchise the line indicated was over a private right of way and they claimed that this made a break in the franchise, because the city could not grant the right of way over private property. Hence that there were two franchises sold. While this objection was attempted to be sustained rather by the affidavits than by the demurrer, still it may be thought that the objection, such as it is, appears upon the face of the bill, and in answer we say:

1. That such a position cannot be read out of the act that is here under consideration unless by a very remote implication. Surely the objection, if it be good at all, must arise out of that act. Nothing is

more common than the granting of franchises to railroad corporations to construct railroads across the continent of the United States, and over every part of the state of California, and the general line of the road is frequently prescribed. But we have never heard it contended that every time it passes over private property it becomes a new franchise, or that the effect of its passing over private property is to defeat the grant. And we say again, that neither of these conclusions would attach unless, by virtue of some provision of the statute of 1901. But we do not know what that provision is, nor has our attention ever been called to it except the fact that the singular number is generally used in expressing the thing granted, but we do not think that the use of the singular number can have any such effect.

2. But it will be observed that the grant is not of a grant over private right of way, but on the contrary, this going over a private right of way is stated as an alternative twice, and it means evidently no more than that this governing body grants the right to run over certain streets which are specifically mentioned, but in making the way from one place to another, if you choose to go over a private right of way, you may do so.

Both of these references to private right of way will be found on page 7, and the first one is on the 17th and 18th lines of the page where, in describing the route:

> "Southerly on Compton avenue to Twenty-third street; thence southerly on Compton avenue to Thirty-eighth street; thence easterly on

> Thirty-eighth street to Compton avenue (or over private right of way from Compton avenue at Twenty-third street to Compton avenue at its intersection with Thirty-eighth street.)"

Again, further down the page:

> "Thence southerly on Tennessee street to Sixteenth street; thence easterly on Sixteenth street to Compton avenue (or over private right of way from Tennessee street at Little Rock avenue to the intersection of Compton avenue and Sixteenth street)."

Now the thing granted and sold was the right to go along these streets, but owing to the situation at these two points, if the purchaser of the franchise along the street saw fit to, or could, obtain upon terms satisfactory to himself, a private right of way which might be more convenient in making these changes, he was granted the right to do so.

As said before, this argument was made mainly upon the affidavits, but when the description contained in this notice is put upon the map of the city, it is seen that there is no break at all, unless the mere fact that getting from one point to another for a short distance, the going over a private right of way, would have that effect. The fact that the city had not the power to grant the private right of way has nothing to do with the case. As already stated, it does not have any such an effect on any other grant of a right of way for a railway. The government, state or federal, assumes to have no power to grant to a railroad corporation the right to run over somebody else's property except, indeed, upon the terms prescribed by

the constitution, that just compensation shall be made. The thing granted in either case, that is, under the act of 1901 or under these general acts granting franchises to railroad corporations, the thing granted is the right to construct and operate the railway along certain lines, and whatever private interest may be affected by it in such manner as to entitle the owner to compensation must be met by whomsoever purchases the franchise. It has become the settled law of the state of California that the construction of a street railway in the streets of a city is not the imposition of an additional burden which will entitled an abutting property owner to damages. But our constitution does declare that private property shall not be taken nor damaged for public use without just compensation being first paid.

Constitution, Art I, sec. 14.

While the construction of a street railway is not, according to the decisions of our court, the imposition of an additional burden merely in itself, and of itself, yet nevertheless it is conceivable that it might be so constructed with reference to some particular individual's property as to amount to a damage of that property. But the grant of the franchise would not be void on that account, but in the construction and operation of the railway it would be incumbent upon the purchaser of the franchise to make compensation. Nor would such fact in any manner affect the competitive bidding. The power of eminent domain necessary to be exercised in such case, unless the parties could

agree, is open to any and all purchasers or bidders alike, and the right of eminent domain in such cases does exist.

C. C. P. sec. 1238.

It was contended in the court below that the United States Circuit Court had no jurisdiction over the cause as such federal court. In other words, that the case was not one involving a federal question.

A sufficient answer to this is in the decision of the circuit court itself upon this question, the case decided by it and referred to in the opinion, namely, Riverside & Arlington Railway Company v. City of Riverside, 118 Fed. 736, and the cases cited therein.

In this cause there was the claim of a contract made with the city, and the impairment of the obligation thereof, and the claim that property had vested under those proceedings taken for the sale of the property, and that the subsequent proceedings operated to deprive the plaintiff of its property without due process of law, and the cases cited in the opinion last referred to, clearly show that it makes no difference whether the claim thus made is well or ill founded, it brings the case within the jurisdiction of the federal court provided, of course, that it is made in good faith.

And see in addition,

Crystal Springs Land & Water Co. v. City of Los Angeles, 76 Fed. 148, 155.

And that although the legislature of the state alone may have the right to make such a grant, that right may be exercised by direct legislation or through

other agencies duly authorized, having power for that purpose, and that the contract, when made, or the grant when made, is the act of the state. That when the municipal corporation acts under an assumed authority from the state, it is sufficient to sustain the federal jurisdiction.

Hamilton Gas Light & Coke Co. v. City of Hamilton, 146 U. S. 258, 266; 36 L. Ed. 963.

Furthermore, when an ordinance is passed and accepted whereby a contract is made between the city and a private person, another ordinance which attempts to repeal that under which the contract arose, is void as being a law impairing the obligation of the contract.

Illinois Trust & Savings Co. v. City of Arkansas City, 76 Fed. 271.

See also:

Saginaw Gas Light Co. v. City of Saginaw, 28 Fed. 529.

Little Falls Electric & Water Co. v. City of Little Falls, 102 Fed. 663, 666-667.

Southwest Missouri Light Co. v. City of Joplin, 101 Fed. 23.

Iron Mountain R. Co. of Memphis v. City of Memphis, 96 Fed. 113.

In the present case the passage of the subsequent ordinance or resolution for the readvertisement of these franchises, and the other acts set forth in the bill, were taken under an assumed authority from the state, and by virtue of the powers of the city over the streets, and its general powers to promote and main-

tain an efficient government, and the appellees still insist that the city was acting, not under an assumed authority merely, but that it actually had that authority. And if, as we claim, that under the action of the council in selling the franchise to the appellant there was a contract made, then the subsequent action of the municipal authorities did impair the obligations of that contract, and those acts were intended by the council to impair the obligations of that contract, if any were incurred. If we are correct in our position, under the grant made the appellant had the right to enter upon the streets of the city named in that franchise, and lay down these tracks and operate cars over them; they had the right, when in operation, to collect fares; they had the right to build all necessary turnouts and all necessary adjuncts. But the council did, by its final action, and in further evidence that it intended by its preceding acts to annul and rescind this contract, declare that the whole police power of the city should be used for the purpose of preventing the appellant from exercising any of those rights. And these acts on the part of the council were just as much legislative as the grant of the franchise in the first instance. And if the grant was the exercise of legislative power, as our adversaries have claimed that it was, then so was the action by which all of this was sought to be annulled and set aside.

In the case of Town of Arcata v. The Arcata and Mad River R. R. Co., 92 Cal. 639, it was held that after the defendant had acted upon the terms of the order, and had expended money upon the construction

of a road, the board could not rescind or recall the franchise which it had granted, unless the company had failed to comply with the terms or conditions of the grant.

92 Cal. 645.

In Mercantile Trust & Deposit Co. of Baltimore v. Collins Park Bank & B. R. Co., 99 Fed. 812, 813-814,

where the jurisdiction of the court was questioned, and where, though there was a difference of citizenship, it was claimed that when the parties were arranged in their proper order, there was not the diverse citizenship necessary to sustain the jurisdiction; and upon this question the court evidently doubted, but said it was unnecessary to discuss it further, for if a federal question existed in the case as claimed by the complainant, the jurisdiction did exist, and after stating the facts of the case, reached the conclusion that there was a federal question involved, and that the court had jurisdiction.

In that case the city, in 1891, had granted to certain persons as the representatives of several street railroad lines in the city the right to consolidate the same, and to electrically equip them, and in making the grant the city had reserved the right to allow any other street railroad company to condemn as much as five blocks of the several lines, whenever it should be necessary to allow other companies to reach the center of the city, and the grant in question was to the Collins Park Company to condemn five blocks of the Railway & Power Company, which had become

the successor of the Consolidated. The constitution of Georgia provided that the general assembly should not authorize the construction of any street passenger railway within the limits of any town or city without the consent of the city authorities, and in conformity with this provision of the constitution, and also of the acts of the legislature of the state to the same effect, the city had given its consent in 1891 to the Consolidated Company with the reservations as stated, and consent being asked in 1899 by the Collins Park Company for the use of the streets, the city's consent was given to the use of a number of them, as well as permission to condemn a portion of the track of the Railway & Power Company, and said the court:

> "Of course, the primary authority over all the highways of the state, as well as the streets of the cities and towns, is in the state, and this authority over the same would usually be exercised by the legislature. The constitution of Georgia wisely provides, however, that even the legislature shall not authorize a passenger street railway company to occupy any of the streets of a city or town until it has the consent of the authorities controlling the affairs of the city or town in which such right may be desired. Is it not true, then, that this act of consent—of withholding or granting the use of the streets of the city for such purposes, and, indeed, the entire subject-matter of control of the streets in this way—is the act of the state, through the city authorities as its instrumentality? Does not the provision of the constitution requiring such consent before the legislative grant becomes effective make the action of the city in this respect a part of the

> legislative act? The legislature grants the use of the streets, subject to the city's consent, and is not the city's consent, therefore, a part of the grant? Let us examine some of the authorities on the subject, with a veiw to the determination of this question."

Here the court proceeds to examine the cases upon these questions.

It may be true that acts of this kind, either by the state or by the city, are not strictly and merely legislative acts. But they are the exercise of legislative authority, and that power, when exercised, does become a part of the grant. And other acts of a similar nature, assuming to annul, repeal, or rescind, such contracts, or action taken which prevents the exercise of the rights contracted for, are also the acts of the state, and impair the obligation of the contract.

See also,

Western Paving & Supply Co., 128 Ind. 525; 26 N. E. 188; and 28 N. E. 88.

This case is also reported in 10 L. R. A. 770, 774.

Furthermore, if our contention is correct as to the effect of these proceedings, there can be no question of the fact that it was a contract. The language of the act of 1901 is that it shall be "struck off, sold and granted," and this was done in this case, as alleged in the bill, and the sale was made to the complainant. But a sale is a contract by which, for a pecuniary consideration caled a "price," one transfers to another, an interest in property.

Civil Code of California, sec. 1721.

Bouvier's Law Dictionary, word "sale."

The very use of this term makes it a contract, and upon the payment of the purchase price, the sale was complete, and under all the authorities it is protected by the constitutional provisions against any law impairing the obligation of the contract. See further:

Citizens St. Ry. Co. v. City of Memphis, 53 Fed. 715.

Detroit Citizens St. Ry. Co. v. City of Detroit, 64 F. 628.

But even if there be any doubt upon the question which we have just been discussing, namely, that there was a contract, and an impairment of the obligation thereof, there is no question that the court had jurisdiction of this cause under the XIV amendment of the constitution of the United States; for that provision of the constitution which prohibits a state from depriving any person of life, liberty or property without due process of law is not directed against legislative action merely, as is the contract provision of the constitution. In the latter, the constitution prohibits any state from passing any law impairing the obligation of contracts, but under the XIV amendment it is the state which shall not deprive any person of life, liberty or property, without due process of law. And it has been determined by this court that this provision of the constitution is directed against all the instrumentalities of the state, and that it is not at all necessary that the act by which the complainant is deprived of its property without due process of law, should be in itself an act of the legislature, or in the nature of a law passed by the legislature, or a municipal council

acting, or attempting to act, under the authority of the legislature.

Chicago, Burlington & Quincy R. R. Co. v. City of Chicago, 166 U. S. 226; 41 L. Ed. 979, 983-984.

In re Commonwealth of West Virginia and J. D. Coles, 100 U. S. 339; 25 L. Ed. 676, 679.

Scott v. McNeal, 154 U. S. 34; 38 L. Ed. 896, 901-903.

Iron Mountain R. Co. of Memphis v. City of Memphis, 96 F. 113, 119-123.

Ex parte Ulrich, 42 F. 587.

Nashville, C. & St. L. Ry. Co. v. Taylor, 86 F. 168, 183-184.

Cleveland Cy. Ry. Co. v. City of Cleveland, 94 F. 385, 394-395.

It is obvious, therefore, that the conclusion of the circuit court in favor of its jurisdiction was correct, and that jurisdiction once acquired extends to every question involved in the case, and will be exercised to give the full relief to which the parties may be entitled.

Omaha Horse Ry. Co. v. Cable Tram-Way Co. of Omaha, 32 F. 727.

Park v. New York, L. E. & W. R. Co., 70 F. 641.

Tennessee v. Davis, 100 U. S. 257; 25 L. Ed. 648.

R. R. Co. v. Mississippi, 102 U. S. 135; 26 L. Ed. 96.

Smith v. Bivens, 56 F. 352.

The case mainly relied upon by our adversaries to oust the jurisdiction of the circuit court is the case of

Kiernan v. Multnomah County, 95 F. 849. That was a suit by a resident and citizen of the state of Oregon against the sheriff of that county, to restrain the collection of certain taxes for which the sheriff had a warrant, and under which he threatened to sell complainant's property. The substance of the bill was that the tax and proceeding were not authorized by the law of the state in pursuance of which the sheriff was acting, and to permit the sale of complainant's property in the manner threatened would be to take his property without due or any process of law, in violation of the 14th amendment to the constitution of the United States. The court held that the case was not within the jurisdiction; that the 14th amendment had reference exclusively to state action, and not to the action of individuals. That if it referred to the acts by private individuals every invasion of one person's property rights by another, would be cognizable in the federal courts under this amendment; that the question sought to be presented related to the interpretation to be given the law of the state, and the complaint was that the law was misinterpreted, and would be misapplied to the injury of the plaintiff in his rights of property.

It is submitted that the case has no bearing upon the present question at all. Here the action is the action of the state,—at least, it was so alleged, in good faith, and upon probable grounds. It is true that the right asserted is derived from the statute of the state, and the proceedings thereunder. And it is also true that in determining the question of whether

we have any right, and if so what, necessarily involves an interpretation of the statute, and if that were sufficient grounds for defeating the jurisdiction, it would have defeated it in every case where the jurisdiction has been sustained. No one has any property rights except such as he acquires under the laws of the country in which he lives. No contract is ever made, except by such a transaction as amounts to a contract, under the law. All rights claimed, therefore, have their origin in laws of some character. In nearly all of the cases which we have cited, the rights claimed have been dependent upon some statutory provision, as in the present case. That the constitution of the United States protects contracts made with the state, either by direct legislative action, or through some public officer, or tribunal acting under the authority of the legislature, is settled beyond all controversy. The constitution of the United States protects the obligation of these contracts against impairment by state legislation, whether in the form of a constitutional provision of the state, or an act of the legislature, or by a municipal body created by it, and invested with the general powers and control over the subject, or selected by the state as a mere agency to execute the will of the state. And in every such case the federal court must interpret the laws of the state for itself. Otherwise, it could have no jurisdiction, and no power to secure to the citizens of the United States the protection which the constitution of that government guarantees to them.

These principles have been necessarily determined

in all the cases which we have cited. Some may be a little more specific than others, but the same questions are always involved.

In Central Trust Co. of New York v. Citizens' Trust Co. of Indianapolis, 82 F. 1, it was urged that the suit could not be maintained against the prosecuting attorney, Wiltsie, because he represented the state of Indiana. The court said:

> "If the enactment here in question be valid, then Mr. Wiltsie does represent the state; not the state as a proprietor, however, but the state as a governmental agency. If the enactment be invalid, then he does not represent anything. On the latter hypothesis, he, or any successor to him in office, in attempting to enforce the penalties in the enactment of 1897, would be merely a wrong-doer. The theory of the bill is that that statute is unconstitutional and void. If complainant be mistaken on this one proposition, then the bill cannot be sustained as to any defendant. * * * If, as said, the enactment of 1897 be invalid, then Mr. Wiltsie does not here represent the state; if it be valid, he does. But, on the latter hypothesis, the entire suit must be disposed of before any question special to Mr. Wiltsie can arise. The validity of the amendment, I take it, this court must pass upon."

And after disposing of preliminary matters as to the character in which Mr. Wiltsie was to be regarded, the court further said:

> "When a federal question is involved, the decision of the highest court of the state is not final, but is reviewable by the supreme court of the

United States. To this extent, at least, the judicial power of a state is subordinate to that of the United States. But there is no relation of subordination on the part of any federal court to any state court. In certain cases the federal courts, of their own motion, follow the decision of the state court, as determinative of the rights of a litigant. * * * But where the controversy concerns a contract, and the meaning of the contract depends *on the construction of a state statute or a provision of a state constitution,* a decision on the meaning of said statute or constitutional provision by the highest court of a state, made after the contract was entered into, and rights had vested thereunder, is not conclusive upon a litigant in a federal court. The litigant in such a case is entitled to the independent judgment of the national tribunal."

82 F. pp. 4-5.

And much more to the same effect.

In Bancroft v. Hambly, 94 F. 795, Judge Ross, in delivering the opinion of the Circuit Court of Appeals of the Ninth Circuit, after referring to the decision of the Supreme Court of California interpreting the same contract there under consideration, and after saying that as a precedent it was entitled, as were all of the opinions of that court, to great respect, said:

"The present case, however, involves the interpretation of a contract not in any way dependent upon the construction of any state law, and, that being so, we are not at liberty to follow the decision of that court construing the contract if such contract does not meet with our approval,

but are bound to exercise our own independent judgment."

94 F. 979.

Now, while the interpretation of the act of 1901 by the Supreme Court of California might be binding upon this court in some of its features, yet in the absence of any such decision, the circuit court was, of course, compelled to determne whether there was a contract for itself, and it is true that determination involved necessarily the interpretation of the statute under which it was claimed to have arisen.

In Bank of Kentucky v. Stone, 88 F. 383, a case which is important on many questions involved in the present controversy, the court, after concluding that a judgment of the state court pleaded in that case, and wherein it had been adjudged that the transaction there referred to was a contract binding upon the parties, and that judgment being, as it was, practically between the same parties, was *res judicata,* and that there was no escape from the conclusion that the defendants were estopped from asserting that the complainant had not a contract exempting it from any other taxation than that provided by the Hewitt law, and therefore that the act of November 11, 1892, was an infringement of that contract, and impaired its obligations in violation of that provision of the constitution of the United States, said:

"It is suggested that such a conclusion ousts this court from jurisdiction, because it makes the case turn on a question which does not arise under the laws or the constitution of the United States. We cannot assent to this suggestion. The

> complainant asserts that it has a contract with the commonwealth in respect to taxation, the obligation of which the city of Louisville, the city of Frankfort, and the county of Franklin, by the enforcement of a subsequent law of the state, are seeking to impair. The defendants deny the existence of such a contract, and we must determine whether, as between the parties, such a contract exists. It appears that, as between the complainant and the defendants, it has been conclusively adjudicated that such a contract exists. This relieves the court from re-examining that question as an original one between the present parties; but it does not free the court from the obligation to enforce the constitution of the United States, in favor of the complainant, by enjoining the enforcement of a law which will impair the obligation of a contract thus conclusively established."
>
> Id. 396-397.

In Douglas v. Commonwealth of Kentucky, 168 U. S. 488; 42 L. Ed. 553, 556-559, this court held that it was not required to accept the principles announced by the state court as to the extent to which the contract clause of the federal constitution restricts the power of the state legislature, and said:

> "The defendant invokes the jurisdiction of this court upon the ground that the rights denied to him by the final judgment of the highest court of Kentucky, and which the state seeks to prevent him from exercising, were acquired under an agreement that constituted a contract within the meaning of the federal constitution. This contention is disputed by the state. So that the issue presented makes it necessary to inquire

whether that which the defendant asserts to be a contract was a contract of the class to which the constitution of the United States refers. This court must determine—indeed it cannot consistently with its duty, refuse to determine—upon its own responsibility, in each case as it arises, whether that which a party seeks to have protected under the contract clause of the constitution of the United States is a contract, the obligation of which is protected by that instrument against hostile legislation."

And the court quoted from the opinion of Mr. Justice Wayne in Jefferson Bank v. Kelly, the following passage:

"The constructions given by the courts of the states to state legislation and to state constitutions have been conclusive upon this court, *with a single exception,* and that is when it has been called upon to interpret the contracts of states, though they have been made in the forms of law, or by the instrumentality of a state's authorized functionaries in conformity with state legislation. It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the supreme court of a state, whenever such court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the constitution of the United States which inhibits the states from passing any law impairing the obligation of contracts. Of what use would the appeal to it be to the litigant who feels himself aggrieved by some particular state legislation if this court could not decide,

independently of all adjudication by the supreme court of a state, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the constitution of the United States, and that its obligation should be enforced notwithstanding a contrary conclusion of the supreme court of a state? It never was intended, and cannot be sustained by any course of reasoning, that this court should or could with fidelity to the constitution of the United States follow the construction of the supreme court of a state in such a matter, when it entertained a different opinion; and in forming its judgment in such a case, it makes no difference in the obligation of this court in reversing the judgment of the supreme court of a state upon such a contract, whether it be one claimed to be such, under the form of state legislation, or has been made by a covenant or agreement by the agents of a state, by its authority.

"The doctrine that this court possesses paramount authority, when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the constitution, to determine for itself the existence or nonexistence of the contract set up, and whether its obligation has been impaired by the state enactment, has been affirmed in numerous cases."

42 L. Ed. 557.

It is thus settled by the decisions of the federal courts that it determines for itself whether a contract exists, and whether the act complained of impairs the obligation, and whether property rights have been vested under the proceedings alleged, and whether the

action of the municipal authorities deprived the parties of their property without due process of law. And if the supreme court of California had ever given an opinion upon any similar case, and holding that no such contract existed under these proceedings, and no property rights had vested thereunder, such a decision, whatever might be the respect to which it was entitled and which would be accorded to it, would not be binding upon the federal court. And, as we have already shown, the fact that in determining these questions it is necessary to interpret a state statute, not only makes no difference in the duty of this court, but a case can hardly arise in which it is not called upon to interpret the laws of the state, and apply them to the case before it. And as to the subsequent conduct of the council, it is obvious that there is no comparison between their action, and that of an individual, or a sheriff threatening to sell property for the payment of taxes. The council of the city of Los Angeles, assumed that under its charter the final grant of the franchises struck off and sold to the appellant must be by an ordinance, and that under its charter that ordinance must be approved by the mayor, or retained by him beyond the ten days, or returned with his objections within the ten days; and that in the latter case it was necessary to pass the ordinance by a vote of three-fourths of the council over the veto in order to its finally taking effect, and that, acting under this assumed authority and indeed, regulation of its own conduct by the charter, it did pass the ordinance, sent it to the mayor, who vetoed it; the

council refused to pass it over his veto, and thereupon assumed and asserted that the appellant had no rights whatever under the action which it had previously taken, and proceeded, under an assumed authority from the statute of 1901, to order it referred to the committee for the purpose of reselling it. And acting upon the assumed authority given it by its charter over the streets of the city of Los Angeles, it proceeded to take most efficient measures to prevent the appellant from performing the obligations of the contract on its part, or exercising any rights or privileges or franchises under the contract and conveyance thus made. And there is no question about the jurisdiction of the court over this controversy.

And see further upon these questions:

Sawyer v. Parish of Concordia, 12 F. 754;

Dorian v. City of Shreveport, 20 F. 401;

Michigan Telegraph Company v. City of Charlotte, 93 F. 11;

Houston & Texas Central R. R. Co. v. State of Texas, 177 U. S. 66; 44 L. Ed. 673, 680.

It was also claimed in the court below that the circuit court had no jurisdiction as a court of equity. But whether a bill is sufficient to entitle the complainant to relief, and whether it is sufficient to bring the case within the jurisdiction of a court of equity, are very different questions. Indeed, the determination that the bill does not state facts sufficient to constitute a ground of relief is itself the exercise of jurisdiction. But the bill in this case is one which looks to equitable relief, and no other. And there is no

doubt of the forum which has the jurisdiction to determine whether its allegations are or are not sufficient. That is no more a jurisdictional question than the determination by a court of law whether or not a complaint states facts sufficient to constitute a cause of action. Nor is there a failure of jurisdiction here upon the ground that there is an adequate remedy at law. It has been frequently decided that the remedy at law, in order to exclude the jurisdiction of a court of equity, must be as complete, as practical, and as efficient to the ends of justice in its prompt administration as the remedy in equity. It was so decided in the City of Walla Walla v. The Walla Walla Water Company, 172 U. S. 1; 43 L. Ed. 341, 346.

Many authorities are there cited in support of the same proposition, and it is not necessary in this case to pause to examine the difficulties which would make it impossible that any remedy at law would be adequate, if indeed there be any remedy at law at all. Those elements of damage which would enter into this case are to be found and discussed in the Walla Walla case before referred to, and fully considered in many other cases which will be cited upon another proposition.

What damage would accrue to this plaintiff by delay in construction and operation of its roads, the uncertain element of possibly competing lines being constructed while being delayed, the profits which might accrue to the plaintiff from the operation of its roads, and how far the value of its franchises so purchased might be impaired, and other considera-

tions of like character, belong to that category where it is impossible to determine the extent of the injury which it would suffer. And that those injuries are of an irreparable nature is fully considered in other cases of a like character which we shall cite upon the last remaining question presented to the court below.

It was seriously argued in the circuit court that the complainant was not entitled to the remedy by injunction. That the injuries which complainant will suffer are irreparable in their nature, and that injunction is the proper remedy to prevent the wrongs which are threatened, has been many times determined. It has been determined in not a few of the cases which we have already cited. One of the principal arguments urged in the court below upon this subject was that the suit does, in its substance, look to the taking possession of the streets of the city of Los Angeles, and, as claimed there, ousting the city from that possession, and it was said that injunctions are not granted to oust one party from possession, and to put another in possession. But the difficulty with this argument is that the foundation upon which it rests is not true. The city of Los Angeles neither owns the streets nor is in the possession of them, nor is entitled to the possession, and furthermore, the complainant did not, by the purchase of the franchises referred to, acquire the title to the streets nor the right to the possession of them. It acquired no rights to those streets other than that which belongs to the public generally, namely, the right to occupy and use them in such

manner as to render available the property rights which it did purchase. And this is the right which pertains to the public generally in the streets of a city. A drayman may occupy a greater space in the streets, and use them for purposes different from those which pertain to a footman or the rider of a bicycle, but this is only because to carry on his business it becomes necessary to make a different use from any that is required by one who is traveling on foot, but the drayman cannot exclude other people from the streets, nor occupy them beyond the necessity for the proper conduct of his business. And so it is with the railroad company, and with every other person and corporation. And all the right in the streets which the complainant acquired by the purchase was the right to such reasonable and necessary use of the streets as would enable it to construct and operate its roads, working no unnecessary inconvenience to the rest of the public to use the streets for their several vocations, or for their pleasure. The franchises granted do not, therefore, turn over the possession of the streets to the plaintiff, still less the ownership, nor give any greater right than that which we have just mentioned. And the injunction which simply enables it to exercise the rights and powers and privileges and franchises which it purchased, and paid for, would certainly have no greater effect than the exercise of those rights without the injunction.

Neither do the franchises which are here granted operate to surrender the control of the streets by the city. The city has never been deprived of the powers

over the streets given by the charter, by the innumerable street railways that have already been constructed, and are now being operated. But the control of the streets does not mean that the city has the absolute right of pssession any more than this right of the use by the various corporations and individuals for all the purposes to which public highways are applied, means that they have the right to the exclusive possession. And as the appellant here claimed only the rights for which we have been contending, its right to an injunction to protect those rights, is beyond question. The principles which have been laid down and applied in innumerable cases, some exactly like the present, others of a kindred nature, have settled this matter beyond all controversy. See the Walla Walla case already referred to.

Smith v. American Nat. Bank, 89 F. 832;

Springfield Milling Co. v. Barnard & Leas Mfg. Co., 81 F. 261, 264-266;

Los Angeles City Water Co. v. City of Los Angeles, 88 F. 720;

177 U. S. 558; 44 L. Ed. 886;

Bondholders v. R. R. Commissioners, Fed. Cas. No. 1625;

Piek v. Chicago & N. W. R. R. Co., Fed. Cas. No. 11,138;

Minneapolis Brewing Co. v. McGillivray *et al.*, 104 F. 258, 270-272;

Foster v. City of Joliet, 27 F. 899;

City of Joliet v. Foster, 121 U. S. 286; 30 L. Ed. 942;

Iron Mountain R. R. Co. of Memphis v. City of Memphis, 96 F. 113;

Barthet v. City of New Orleans, 24 F. 563, 567-568;

Kirwan v. Murphy, 83 F. 275;

Caldwell v. Robinson, 59 F. 653. Also 67 F. 391;

Singer Sewing Machine Co. v. American Union Buttonhole & Embroidery Co., Fed Cas. No. 12,904;

Mercantile Trust & Deposit Co. v. Collins Park & B. R. Co., 101 F. 347, 358-359;

Cleveland City Ry. Co. v. City of Cleveland, 94 F. 385, 409;

St. Tammany Water Works Co. and City of New Orleans v. New Orleans Water Works Co., 120 U. S. 64; 30 L. Ed. 653;

New Orleans Gas Light Co. v. Louisiana Light & Heat Producing & Mfg. Co., 115 U. S. 650; 29 L. Ed. 516;

Leverich v. Mayor *et al.*, of Mobile, 110 F. 170;

City Ry. Co. v. Citizens Street R. R. Co., 166 U. S. 557; 41 L. Ed. 1114.

The appeal in this last case was taken from the judgment reported in 64 Federal, 647. And see,

Citizens Street Ry Co. v. City of Memphis, 53 F. 715.

Another argument insisted upon in the court below upon this proposition was that courts will not enjoin municipal authorities or other legislative bodies from exercising their legislative or discretionary powers. It might be a sufficient answer to this that the legisla-

tive powers had been exercised and were seeking to enjoin the enforcement of that legislation against the complainant in this case. All action of the council is not legislative, notwithstanding that it is a legislative body. But then, whatever may be the character of its action, that the injunction will lie is determined by the cases already cited. In the case of the Los Angeles City Water Company against the City of Los Angeles, in the 88th Federal Reporter, and the case of the same title in the 103rd Federal, and the decision of this court on appeal from the judgment in the case reported in the 88th Federal, all of which have been hereinbefore cited, would of themselves be a sufficient authority against this proposition. In those cases the council of Los Angeles passed an ordinance regulating the rates to be charged by the Los Angeles City Water Company for the use of water, and in both cases it was claimed that the ordinances attacked were in violation of the contract between the Los Angeles City Water Company and the City of Los Angeles, and the object of both suits was to enjoin the city from attempting to enforce those ordinances, and the injunction was granted in both cases, and affirmed by this court in one of them.

But, as already said, all action of legislative bodies is not necessarily legislative, nor is it true that every act in the nature of legislative action is beyond the control of the courts.

In Alpers v. The City and County of San Francisco, 32 F. 503, Mr. Justice Field, after saying that

the legislative acts of the municipality cannot be enjoined, added:

> "But the unconstitutonal acts of either party may be annulled. * * After its passage the judiciary may declare the law unconstitutional. * * * But previous to that time judicial powers cannot be invoked."
>
> 32 F. 508.

Again:

> "In what we have said of the want of authority in courts of equity over the action of a municipal corporation, we confine ourselves strictly to such action as is *purely legislative*, upon a matter which is, by its charter or law, made subject to its *legislative discretion*. That the exercise of such legislative discretion of municipal bodies shall be exempt from judical restraint, is declared in the laws of this state."
>
> *Id.* 507.

On the same page, and before that, he had said:

> "A municipal corporation may be clothed, and generally is clothed, with other than legislative powers, and in their exercise may, in many instances, be brought under the jurisdiction and control of the courts. If, for instance, it be the holder of property as trustee, it may be required to execute the trust assumed, and to make such disposition of the property as the trust requires. If, being the owner of property, it contracts for its sale, the execution of the contract can be enforced as in the case of such contracts by natural persons. So, also, if it attempt to act upon matters not by its charter or law subject to its jurisdiction, it may be reminded of the limitations upon its powers, and brought to a more careful

consideration of them, by the process of the courts; and if the rights of third parties will be injuriously affected by its proposed action, it may be enjoined therefrom. It matters not in such cases that *its action takes the form of legislation* when it is not, in fact, the exercise of legislative power, or upon a matter which is committed to its jurisdiction."

32 F. 507.

See,

North Jersey Street Ry. Co. v. Inhabitants of the Township of Orange, 43 A. 53.

It is true it has been said by the supreme court of California that the granting of a franchise is a purely legislative act, the exercise of legislative power. And this, no doubt, is true in the sense in which it was manifestly intended, namely, that the granting of a franchise must be either the act of the legislature directly, or it must come from legislative authority. But even where this has been said by the supreme court of Californa, it has occurred in cases where it was not necessary to be technically accurate. The most of them are cases where writs of *certiorari* were applied for. It has been many times held by the supreme court of California that the writ only lies to review judicial action, and about all that was decided in most of those cases was that the action was not judicial.

In the Spring Valley Water Works against the City and County of San Francisco case, 82 Cal. 286, 307, the court having this very matter distinctly before its attention, said:

"The ground taken by the appellant is, that the fixing of rates is a legislative act; that by the terms of the constitution the board of supervisors are made a part of the legislative department of the state government, and exclusive power given to them which cannot be encroached upon by the courts. In other words, the board of supervisors, for the purpose of fixing these water rates, is a part of one of the co-ordinate and independent departments of the state government, and, as such, beyond and independent of, any control by the judicial department.

"This court has held that the fixing of water rates is a *legislative act, at least to the extent that the action of the proper bodies clothed with such power cannot be controlled by writs which can issue only for the purpose of controlling judicial action.* * * * There are other cases holding the act to be legislative, but whether it is judicial, legislative, or administrative, is immaterial. Let it be which it may, it is not above the control of the courts in proper cases."

82 Cal. 307-308.

See also the case of Davis v. Mayor etc., of New York, 4 Duer, 451-497, and the quotation made from it in 82 Cal. 308-311.

This opinion delivered in the Spring Valley Water Works case will, we think, explain every case in the California reports that seems to be holding the extreme doctrine contended for by our adversaries.

In People v. Dean, 122 Cal. 421, is a distinct enunciation of the proposition that the granting of a franchise under the act of 1893, quite similar to the act of 1901, was a purely legislative act, but in that case

there was an application for a writ of *certiorari* which was denied, and the entire meaning of it was that it was not judicial, and therefore not subject to a writ of *certiorari*. The legislation in this case is in the act of 1901, which nobody is trying to enjoin. The acts of the council in pursuance of that act and of the authority therein conferred, is simply the performance of those duties and the exercise of the powers given for the purpose of carrying the act into effect, and doubtless are a part of the contract made. Its acts in directing the mayor and the chief of police to employ the police power to prevent the complainant from exercising the rights granted may be legislative in character, but those resolutions and the orders were passed before this suit was begun, and we deny that the forcible prevention of the complainant from exercising its contract and property rights are legislative. They are simply the means by which the city threatens and intends to enforce its orders which, if illegal, may be restrained.

We feel conscious of having devoted much more attention to the jurisdiction of the court, both as a federal court and a court of equity and to the question of the propriety of the remedy sought here, probably, than was necessary. We think that the one question in this case that is of any difficulty, or admitting of more than one opinion, is the question to which the Honorable Circuit Court gave its principal attention. And if, under a fair construction of the act of 1901, a contract was made, and property rights were vested in the complainant, there is no question as to the juris-

diction of the court, or the right of the complainant to the relief sought.

Respectfully submitted,

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